S. HRG. 99-523

SUPPLEMENTARY EXTRADITION TREATY BETWEEN THE UNITED STATES AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

THE IMPACT OF THE SUPPLEMENTARY TREATY UPON AMERICAN DOMESTIC LAW AND UPON THE AMERICAN CONSTITUTIONAL PROCESS IN THE FIGHT AGAINST TERRORISM

NOVEMBER 5, 1985

Serial No. J-99-71

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SUPPLEMENTARY EXTRADITION TREATY BETWEEN THE UNITED STATES AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

TUESDAY, NOVEMBER 5, 1985

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Also present: Senators Thurmond, Grassley, and DeConcini.

Staff present: Robert Friedlander, counsel; Sharon Faxon, chief clerk; Nathalie Blackwell, legislative assistant; and Robert Fiedler, minority counsel.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. I want to welcome the distinguished group of witnesses to this morning's hearing. I believe this hearing to be one of particular importance. The administration has termed this treaty to be essential in the fight against terrorism. As you know, terrorism affects us all and threatens all of us in the free world, and any legal measure to combat this continuing and dangerous phenomenon deserves careful consideration, and if constitutional, then full support by the Congress. Second, and of similar importance, is the question of the impact of the supplementary treaty upon American domestic law and upon the American constitutional process.

There are a number of treaties and conventions submitted by the executive branch to the Senate for its advice and consent which raise questions about their impact upon the American constitutional legal process. The Genocide Convention and many ILO conventions, for example, in their present form—without reservations—have a dubious constitutional validity. In fact, there are ILO conventions which would change the nature and substance of American domestic law in the labor field.

It is for these reasons, among others, that we are holding this morning's hearing. Treaties per se are not automatically constitutional in all of their aspects merely through the wording of article

VI of the U.S. Constitution, and treaties are not only instruments relating to foreign affairs. The content of many treaties, conventions, and executive agreements have domestic effects as well as foreign aspects. Many of the effects are, in fact, legal in the way that they operate and what they seek to accomplish.

The major issues that I hope we are able to focus upon this morning include the following:

One, is extradition a political matter or a judicial question? Does extradition come under article III, section II, of the U.S. Constitution?

Two, will the supplementary treaty on extradition effectively remove discretionary authority in matters of extradition from the courts and replace it with the control of the executive branch?

Three, how will the supplementary treaty change the U.S. extradition process from the way it currently operates?

Four, in what way does the abolition of the political offense exception change the nature of American extradition jurisprudence?

Five, both the Department of State and the Department of Justice in seeking to establish the legal validity of the supplementary treaty cite as a comparable example, the European Convention on the Suppression of Terrorism (1978). Is this convention actually applicable to the United States and United Kingdom: treaty by way of analogy or precedent, or is it inapplicable to the American extradition process?

Six, what impact—constitutional and legal—does the retroactive provision of the treaty have? (I am, of course, referring to article 4 of the supplemental treaty.)

Seven, the Department of Justice and the Department of State have both indicated on several different occasions, that the U.S. Government intends to conclude similar treaties with other governments after ratification of the United States/United Kingdom Treaty.

What will be the effect of the same kind of treaty concluded with other governments?

Should the nature of foreign legal systems be taken into account?

I believe that the information and the answers which you provide this morning will go a long way toward clarifying the issues relating to the treaty. A solidly based legal and constitutional discussion will also help to resolve the controversy which now surrounds this treaty.

The distinguished participants who are about to testify this morning will be able, by logic and legal argument, to replace the rhetoric and the emotion which have obscured the real and meaningful issues connected with the treaty.

I do look forward to hearing your arguments and to exploring the legal aspects of the extradition process with you after you have completed your formal presentations.

Again my thanks for taking time out to attend this hearing and of course, to give us the benefit of your expertise in this particular area.

I am very happy to have you all here this morning.

[Text of treaty and supplemental material follows:]

EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland:

Desiring to make provision for the reciprocal extradition of offenders;

Have agreed as follows:

ARTICLE I

Each Contracting Party undertakes to extradite to the other, in the circumstances and subject to the conditions specified in this Treaty, any person found in its territory who has been accused or convicted of any offense within Article III, committed within the jurisdiction of the other Party.

ARTICLE II

(1) This Treaty shall apply:

(*a*) in relation to the United Kingdom: to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man, and any territory for the international relations of which the United Kingdom is responsible and to which the Treaty shall have been extended by agreement between the Contracting Parties embodied in an Exchange of Notes; and

(*b*) to the United States of America;

and references to the territory of a Contracting Party shall be construed accordingly.

(2) The application of this Treaty to any territory in respect of which extension has been made in accordance with paragraph (1) of this Article may be terminated by either Contracting Party giving six months' written notice to the other through the diplomatic channel.

ARTICLE III

(1) Extradition shall be granted for an act or omission the facts of which disclose an offense within any of the descriptions listed in the Schedule annexed to this Treaty, which is an integral part of the Treaty, or any other offense, if:

(*a*) the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty;

(*b*) the offense is extraditable under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of sub-paragraph (1) (*a*) of Article II; and

(c) the offense constitutes a felony under the law of the United States of America.

(2) Extradition shall also be granted for any attempt or conspiracy to commit an offense within paragraph (1) of this Article if such attempt or conspiracy is one for which extradition may be granted under the laws of both Parties and is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty.

(3) Extradition shall also be granted for the offense of impeding the arrest or prosecution of a person who has committed an offense for which extradition may be granted under this Article and which is punishable under the laws of both Parties by imprisonment or other form of detention for a period of five years or more.

(4) A person convicted of and sentenced for an offense shall not be extradited therefor unless he was sentenced to imprisonment or other form of detention for a period of four months or more or, subject to the provisions of Article IV, to the death penalty.

ARTICLE IV

If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.

ARTICLE V

(1) Extradition shall not be granted if:

(a) the person sought would, if proceeded against in the territory of the requested Party for the offense for which his extradition is requested, be entitled to be discharged on the grounds of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third State; or

(b) the prosecution for the offense for which extradition is requested has become barred by lapse of time according to the law of the requesting or requested Party; or

(c) (i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or

(ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.

(2) Extradition may be refused on any other ground which is specified by the law of the requested Party.

ARTICLE VI

If the person sought should be under examination or under punishment in the territory of the requested Party for any other offense, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

ARTICLE VII

(1) The request for extradition shall be made through the diplomatic channel, except as otherwise provided in Article XV.

(2) The request shall be accompanied by:

(a) a description of the person sought, his nationality, if known, and any other information which would help to establish his identity;

(b) a statement of the facts of the offense for which extradition is requested;

(c) the text, if any, of the law

(i) defining that offense;

(ii) prescribing the maximum punishment for that offense; and

(iii) imposing any time limit on the institution of proceedings for that offense;

and

(d) (i) where the requesting Party is the United Kingdom, a statement of the legal provisions which establish the extraditable character of the offense for which extradition is requested under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of sub-paragraph (1)(a) of Article II;

(ii) where the requesting Party is the United States of America, a statement that the offense for which extradition is requested, constitutes a felony under the law of the United States of America.

(3) If the request relates to an accused person, it must also be accompanied by a warrant of arrest issued by a judge, magistrate or other competent authority in the territory of the requesting Party and by such evidence as, according to the law of the requested Party, would justify his committal for trial if the offense had been committed in the territory of the requested Party, including evidence that the person requested is the person to whom the warrant of arrest refers.

(4) If the request relates to a convicted person, it must be accompanied by a certificate or the judgement of conviction imposed in the territory of the requesting Party and by evidence that the person requested is the person to whom the conviction refers and, if the person was sentenced, by evidence of the sentence imposed and a statement showing to what extent the sentence has not been carried out.

(5) The warrant of arrest, or the judicial document establishing the existence of the conviction, and any deposition or statement or other evidence given on oath or affirmed, or any certified copy thereof shall be received in evidence in any proceedings for extradition:

(a) if it is authenticated in the case of a warrant by being signed, or in the case of any other original document by being certified, by a judge, magistrate or other competent authority of the requesting Party, or in the case of a copy by being so certified to be a true copy of the original; and

(b) where the requesting Party is the United Kingdom, by being sealed with the official seal of the appropriate Minister and certified by the principal diplomatic or consular officer of the United States of America in the United Kingdom; and where the requesting Party is the United States of America, by being sealed with the official seal of the Department of State for the Secretary of State; or

(c) if it is authenticated in such other manner as may be permitted by the law of the requested Party.

ARTICLE VIII

(1) In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on application through the diplomatic channel by the competent authorities of the requesting Party. The application shall contain an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a conviction against that person, and, if available, a description of the person sought, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested Party.

(2) A person arrested upon such an application shall be set at liberty upon the expiration of forty-five days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of the person sought if a request is subsequently received.

ARTICLE IX

(1) Extradition shall be granted only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party.

(2) If the requested Party requires additional evidence or information to enable a decision to be taken on the request for extradition, such evidence or information shall be submitted within such time as that Party shall require.

ARTICLE X

If the extradition of a person is requested concurrently by one of the Contracting Parties and by another State or States, either for the same offense or for different offenses, the requested Party shall make its decision in so far as its law allows, having regard to all the circumstances, including the provisions in this regard in any Agreements in force between the requested Party and the requesting States, the relative seriousness and place

of commission of the offenses, the respective dates of the requests, the nationality of the person sought and the possibility of subsequent extradition to another State.

ARTICLE XI

(1) The requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition.

(2) If a warrant or order for the extradition of a person sought has been issued by the competent authority and he is not removed from the territory of the requested Party within such time as may be required under the law of that Party, he may be set at liberty and the requested Party may subsequently refuse to extradite him for the same offense.

ARTICLE XII

(1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State—

(a) until after he has returned to the territory of the requested Party; or

(b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

(2) The provisions of paragraph (1) of this Article shall not apply to offenses committed, or matters arising, after the extradition.

ARTICLE XIII

When a request for extradition is granted, the requested Party shall, so far as its law allows and subject to such conditions as it may impose having regard to the rights of other claimants, furnish the requesting Party with all sums of money and other articles—

(a) which may serve as proof of the offense to which the request relates; or

(b) which may have been acquired by the person sought as a result of the offense and are in his possession.

ARTICLE XIV

(1) The requested Party shall make all necessary arrangements for and meet the cost of the representation of the requesting Party in any proceedings arising out of a request for extradition.

(2) Expenses relating to the transportation of a person sought shall be paid by the requesting Party. No pecuniary claim arising out of the arrest, detention, examination and surrender of a person sought under the provisions of this Treaty shall be made by the requested Party against the requesting Party.

ARTICLE XV

A request on the part of the Government of the United States of America for the extradition of an offender who is found in any of the territories to which this Treaty has been extended in accordance with paragraph (1) of Article II may be made to the Governor or other competent authority of that territory, who may take the decision himself or refer the matter to the Government of the United Kingdom for their decision.

ARTICLE XVI

(1) This Treaty shall be ratified, and the instruments of ratification shall be exchanged at Washington as soon as possible. It shall come into force three months after the date of the exchange of instruments of ratification. [1]

(2) This Treaty shall apply to any offence listed in the annexed Schedule committed before or after this Treaty comes into force, provided that extradition shall not be granted for an offence committed before this Treaty comes into force which was not an offence under the laws of both Contracting Parties at the time of its commission.

(3) On the entry into force of this Treaty the provisions of the Extradition Treaty of December 22, 1931 [2] shall cease to have effect as between the United Kingdom and the United States of America.

(4) Either of the Contracting Parties may terminate this Treaty at any time by giving notice to the other through the diplomatic channel. In that event the Treaty shall cease to have effect six months after the receipt of the notice.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

Done in duplicate at London in the English language this 8th day of June, 1972.

For the Government of the United States of America:

Walter Annenberg [3]

For the Government of the United Kingdom of Great Britain and Northern Ireland:

Anthony Kershaw [4]

---

[1] Jan. 21, 1977.
[2] TS 849; 47 Stat. 2122
[3] W. H. Annenberg
[4] Anthony Kershaw

SCHEDULE

List of offenses referred to in Article III

1. Murder; attempt to murder, including assault with intent to murder.
2. Manslaughter.
3. Maliciously wounding or inflicting grievous bodily harm.
4. Unlawful throwing or application of any corrosive or injurious substance upon the person of another.
5. Rape; unlawful sexual intercourse with a female; indecent assault.
6. Gross indecency or unlawful sexual acts with a child under the age of fourteen years.
7. Procuring a woman or young person for immoral purposes; living on the earnings of prostitution.
8. Unlawfully administering drugs or using instruments with intent to procure the miscarriage of a woman.
9. Bigamy.
10. Kidnapping, abduction, false imprisonment.
11. Neglecting, ill-treating, abandoning, exposing or stealing a child.
12. An offense against the law relating to narcotic drugs, cannabis sativa L., hallucinogenic drugs, cocaine and its derivatives, and other dangerous drugs.
13. Theft; larceny; embezzlement.
14. Robbery; assault with intent to rob.
15. Burglary or housebreaking or shopbreaking.
16. Receiving or otherwise handling any goods, money, valuable securities or other property, knowing the same to have been stolen or unlawfully obtained.
17. Obtaining property, money or valuable securities by false pretenses or other form of deception.
18. Blackmail or extortion.
19. False accounting.
20. Fraud or false statements by company directors and other officers.
21. An offense against the bankruptcy laws.
22. An offense relating to counterfeiting or forgery.
23. Bribery, including soliciting, offering or accepting bribes.
24. Perjury; subornation of perjury.
25. Arson.
26. Malicious damage to property.
27. Any malicious act done with intent to endanger the safety of persons travelling or being upon a railway.
28. Piracy, involving ships or aircraft, according to international law.
29. Unlawful seizure of an aircraft.

PROTOCOL OF SIGNATURE

At the time of signing this day the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the Treaty"), the undersigned have agreed as follows:

(1) Article III of the Treaty shall permit the Government of the United States of America to obtain the extradition of a person for an offense to which the Treaty relates when United States Federal jurisdiction is based upon interstate transport or transportation or the use of the mails or of interstate facilities, these aspects being jurisdictional only.

(2) This Protocol of Signature shall form an integral part of the Treaty.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

Done in duplicate at London in the English language this 9th day of June, 1972.

For the Government of the United States of America:

Walter Annenberg

For the Government of the United Kingdom of Great Britain and Northern Ireland:

Anthony Kirkwood

[EXCHANGES OF NOTES]

FOREIGN AND COMMONWEALTH OFFICE
LONDON S.W. 1

ONE SPAIN 8 JUNE 1972

His Excellency
The Honourable
WALTER H ANNENBERG
etc etc etc
Grosvenor Square
London W1A 1AE

YOUR EXCELLENCY

I have the honour to refer to Article 16, paragraph (2), of the Extradition Treaty between our two Governments signed today.

It is the understanding of the Government of the United Kingdom that, without prior concurrence by both Governments, no application will be made for the extradition of a person for an offence committed before the Treaty signed today enters into force if extradition of such person for that offence, or any other offence, has previously been denied because the offence was not included in the Extradition Treaty between the United Kingdom and the United States, signed at London on 22 December, 1931.

I would appreciate receiving confirmation that the foregoing is also the understanding of the Government of the United States.

I have the honour to be
with the highest consideration
Your Excellency's obedient Servant
(For the Secretary of State)

R. V. RICHARDSON

EMBASSY OF THE UNITED STATES OF AMERICA
LONDON

JUNE 8, 1972

EXCELLENCY:

I have the honor to acknowledge receipt of your note of June 8, 1972 which reads as follows:

"I have the honour to refer to Article 16, paragraph (2), of the Extradition Treaty between our two Governments signed today.

"It is the understanding of the Government of the United Kingdom that, without prior concurrence by both Governments, no applica-

tion will be made for the extradition of a person for an offence committed before the Treaty signed today enters into force if extradition of such person for that offence, or any other offence, has previously been denied because the offence was not included in the Extradition Treaty between the United Kingdom and the United States, signed at London on 22 December, 1931.

"I would appreciate receiving confirmation that the foregoing is also the understanding of the Government of the United States."

I confirm that the foregoing is also the understanding of the Government of the United States.

Accept, Excellency, the renewed assurances of my highest consideration.

WALTER ANNENBERG

THE SECRETARY OF STATE FOR
FOREIGN & COMMONWEALTH AFFAIRS
FOREIGN OFFICE
London, S.W.1.

BRITISH EMBASSY,
Washington, D.C.

21 OCTOBER 1976

SIR

I have the honour to refer to the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America signed at London on 8 June 1972. In accordance with the provisions of paragraph (1)(a) of Article II I have the honour to propose that, with effect from the date of entry into force of the Treaty, the application of the Treaty shall extend to those territories listed in the Annex to this Note for the international relations of which the United Kingdom is responsible.

If the foregoing proposal is acceptable to the Government of the United States of America, I have the honour to propose that this Note, together with its Annex and Your Excellency's reply in that sense, shall constitute an Agreement between the two Governments in this matter.

I avail myself of this opportunity to renew to you, Sir, the assurance of my highest consideration.

PETER RAMSBOTHAM

THE HONORABLE
HENRY A KISSINGER
Secretary of State of the United States of America
Washington DC

TIAR 8365

ANNEX

Antigua
Belize
Bermuda
British Indian Ocean Territory
British Virgin Islands
Cayman Islands
Dominica
Falkland Islands and Dependencies
Gibraltar
Gilbert Islands
Hong Kong
Montserrat
Pitcairn, Henderson, Ducie and Oeno Islands
St Christopher, Nevis and Anguilla
St Helena and Dependencies
St Lucia
St Vincent
Solomon Islands
Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus
Turks and Caicos Islands
Tuvalu

DEPARTMENT OF STATE
WASHINGTON

OCTOBER 21, 1976

EXCELLENCY:

I have the honor to acknowledge receipt of your note of October 21, 1976, which reads as follows:

"Sir

I have the honour to refer to the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America signed at London on 8 June 1972. In accordance with the provisions of paragraph (1)(a) of Article II I have the honour to propose that, with effect from the date of entry into force of the Treaty, the application of the Treaty shall extend to those territories listed in the Annex to this Note for the international relations of which the United Kingdom is responsible.

If the foregoing proposal is acceptable to the Government of the United States of America, I have the honour to propose that

this Note, together with its Annex and Your Excellency's reply in that sense, shall constitute an Agreement between the two Governments in this matter.

I avail myself of this opportunity to renew to you, Sir, the assurance of my highest consideration.

ANNEX

Antigua
Belize
Bermuda
British Indian Ocean Territory
British Virgin Islands
Cayman Islands
Dominica
Falkland Islands and Dependencies
Gibraltar
Gilbert Islands
Hong Kong
Montserrat
Pitcairn, Henderson, Ducie and Oeno Islands
St Christopher, Nevis and Anguilla
St Helena and Dependencies
St Lucia
St Vincent
Solomon Islands
Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus
Turks and Caicos Islands
Tuvalu"

I have the honor to inform Your Excellency that the foregoing is acceptable and reflects correctly the understanding of the Government of the United States of America, and that Your Excellency's note and this note in reply concurring therein, together with its Annex, constitute an agreement between our two Governments concerning the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America signed at London on 8 June 1972.

TIAS 8468

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State:

CHARLES W ROBINSON

His Excellency
The Honorable
Sir Peter E. Ramsbotham, G.C.V.O., K.C.M.G.,
British Ambassador

99TH CONGRESS
1st Session

SENATE

TREATY DOC.
99-8

SUPPLEMENTARY EXTRADITION TREATY WITH THE UNITED KINGDOM

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE SUPPLEMENTARY EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, WITH ANNEX, SIGNED AT WASHINGTON ON JUNE 25, 1985

JULY 17, 1985.—Treaty was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for use of the Senate

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U.S. GOVERNMENT PRINTING OFFICE

51-118 O

WASHINGTON : 1985

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *July 17, 1985.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Supplementary Extradition Treaty between the United States of America and the United Kingdom, with annex, signed at Washington on June 25, 1985.

I transmit also, for the information of the Senate, the report of the Department of State with respect to the Supplementary Treaty.

The Supplementary Treaty adds to and amends the Extradition Treaty between the United States and the United Kingdom, signed at London on June 8, 1972.

It represents a significant step in improving law enforcement cooperation and combatting terrorism, by excluding from the scope of the political offense exception serious offenses typically committed by terrorists, e.g., aircraft hijacking and sabotage, crime against diplomats, hostage taking, and other heinous acts such as murder, manslaughter, malicious assault, and certain serious offenses involving firearms, explosives, and damage to property.

The Supplementary Treaty, in addition to narrowing the application of the political offense exception to extradition, will also help improve implementation of the current Extradition Treaty in several other respects. I recommend that the Senate give early and favorable consideration to the Supplementary Treaty and give its advice and consent to ratification.

RONALD REAGAN.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, July 3, 1985.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Supplementary Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, with annex, signed at Washington on June 25, 1985. I recommend that the Supplementary Treaty be transmitted to the Senate for advice and consent to ratification.

The Supplementary Treaty supplements and amends the Extradition Treaty between the United States and the United Kingdom, signed at London on June 8, 1972 (28 U.S.T. 227; TIAS 8468). The Supplementary Extradition Treaty would exclude specified crimes of violence, typically committed by terrorists, from the scope of the political offense exception to extradition. It therefore represents a significant step to improve law enforcement cooperation and counter the threat of international terrorism and other crimes of violence.

Article 1 of the Supplementary Treaty effectively limits the scope of Article V, paragraph (1)(c)(i) of the current Extradition Treaty—the political offense exception—by listing the crimes which shall not be regarded as offenses of a political character, namely: aircraft hijacking; aircraft sabotage; crimes against internationally protected persons, including diplomats; hostage taking; as well as murder; manslaughter; malicious assault; kidnapping; and specified firearms, explosives, and serious property damage offenses.

Article 2 of the Supplementary Treaty amends Article V, paragraph (1)(b) of the current Extradition Treaty by providing that extradition shall be denied if prosecution would be barred by the statute of limitations of the requesting State. The current treaty provision permits the statute of limitations of either the requesting or requested State to apply.

Article 3 of the Supplementary Treaty amends Article VIII, paragraph (2) of the current Extradition Treaty by providing that the requesting State shall have as much as 60 days following provisional arrest to submit evidence in support of an extradition request, and that if by that time such evidence has not been submitted the person arrested shall be set at liberty. The current treaty allows only 45 days.

Article 4 of the Supplementary Treaty provides that its provisions shall apply to any offense committed before or after the entry

into force of the Supplementary Treaty, but shall not apply to an offense committed before the Supplementary Treaty enters into force if the offense in question was not an offense under the laws of both Contracting Parties at the time of its commission.

Article 5 of the Supplementary Treaty provides that it shall form an integral part of the current Extradition Treaty and sets forth its territorial application for the United States and the United Kingdom, respectively.

Article 6 of the Supplementary Treaty provides that it shall enter into force upon the exchange of instrumens of ratification and shall be subject to termination in the same manner as the current Extradition Treaty.

The Department of Justice joins the Department of State in favoring transmission of this Supplementary Treaty to the Senate at the earliest possible date.

Respectfully submitted,

GEORGE P. SHULTZ.

SUPPLEMENTARY TREATY CONCERNING THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, SIGNED AT LONDON ON 8 JUNE 1972

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at London on 8 June 1972 (hereinafter referred to as "the Extradition Treaty");

Have resolved to conclude a Supplementary Treaty and have agreed as follows:

ARTICLE 1

For the purposes of the Extradition Treaty, none of the following offenses shall be regarded as an offense of a political character:

(a) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970;

(b) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;

(c) an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;

(d) an offense within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;

(e) murder;

(f) manslaughter;

(g) maliciously wounding or inflicting grievous bodily harm;

(h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;

(i) the following offenses relating to explosives:

(1) the causing of an explosion likely to endanger life or cause serious damage to property; or

(2) conspiracy to cause such an explosion; or

(3) the making of possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;

(j) the following offenses relating to firearms or ammunition:

(1) the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or

(2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;

(k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;

(l) an attempt to commit any of the foregoing offenses.

ARTICLE 2

Article V, paragraph (1)(b) of the Extradition Treaty is amended to read as follows:

"(b) the prosecution for the offense for which extradition is requested has become barred by lapse of time according to the law of the requesting Party; or"

ARTICLE 3

Article VIII, paragraph (2) of the Extradition Treaty is amended to read as follows:

"(2) A person arrested upon such an application shall be set at liberty upon the expiration of sixty days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of the person sought if a request for extradition is subsequently received."

ARTICLE 4

This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.

ARTICLE 5

This Supplementary Treaty shall form an integral part of the Extradition Treaty and shall apply:

(a) in relation to the United Kingdom: to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man and the territories for whose international relations the United Kingdom is responsible which are listed in the Annex to this Supplementary Treaty;

(b) to the United States of America;

and references to the territory of a Contracting Party shall be construed accordingly.

ARTICLE 6

This Supplementary Treaty shall be subject to ratification and the instruments of ratification shall be exchanged at London as soon as possible. It shall enter into force upon the exchange of instruments of ratification. It shall be subject to termination in the same manner as the Extradition Treaty.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Supplementary Treaty.

DONE in duplicate at Washington this twenty-fifth day of June, 1985.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

ANNEX

Anguilla
Bermuda
British Indian Ocean Territory
British Virgin Islands
Cayman Islands
Falkland Islands
Falkland Islands Dependencies
Gibraltar
Hong Kong
Montserrat
Pitcairn, Henderson, Ducie and Oeno Islands
St. Helena
St. Helena Dependencies
The Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus
Turks and Caicos Islands

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The Evolution of the Political Offense Exception in an Age of Modern Political Violence

Duane K. Thompson*

The United States is party to ninety-six extradition treaties,[1] each of which specifies that no obligation exists to extradite an individual for an act that constitutes a political offense.[2] Born of the experience of the Enlightenment,[3] this doctrine has become known as the "political offense" exception. The exception allows countries to remain neutral in foreign conflicts, at least to the extent of declining to deliver participants into the hands of their enemies.

The courts are charged with an initial determination of whether the exception applies in particular cases. United States courts have not inquired into the legitimacy of the foreign government requesting extradition.[4] They have, instead, sought to determine whether the individual's

* J.D., Yale University.

1. International extradition is defined as the act by which one nation surrenders an individual who is present within its territory to another nation that has charged or convicted the individual for the commission of a crime within its territorial jurisdiction. The duty to extradite only arises pursuant to express treaty provisions. J.B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 3-5 (1891).

For a list of the 96 nations which are parties to bilateral extradition treaties with the United States, see 18 U.S.C. § 3181 (1982).

2. The standard formulation of a political offense exception is exemplified in the extradition treaty between the United States and the United Kingdom, which provides:

> Extradition shall not be granted if:
> (i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try to punish him for an offense of a political character.

Treaty of Extradition, June 8, 1972, United States-United Kingdom, art. 5, sec. 1, 28 U.S.T. 227, T.I.A.S. No. 8468.

3. *See, e.g.*, J. LIVELY, THE ENLIGHTENMENT (1966). Before the development of the political offense exception, the primary purpose of extradition had been to facilitate the apprehension and punishment of political dissidents. Medieval overlords used extradition more as a device to retrieve their political enemies than as a means to bring ordinary criminals to justice. Enlightenment thinking and the revolutionary upheaval of the eighteenth and early nineteenth centuries were significant factors leading to change in the doctrine and practice of extradition. Emergence of constitutional government from the American and French revolutions broadened concern for individual liberty and tolerance of rebellion against unjust regimes. States thereafter began to recognize a duty to grant asylum to political dissidents. Thus, by the nineteenth century, the international community had renounced extradition as a permissible means to suppress political opposition. *See generally*, Sutherland, *The Development of International Law of Extradition*, 28 ST. LOUIS U. L. J. 33-35 (1984).

4. Indeed, such an inquiry would be patently beyond the legitimate scope of judicial inquiry and could be assessed, if at all, only by the executive branch of the United States govern-

commission of a violent act is related to a larger pattern of political conflict. This mode of inquiry has become known as the "incidence test."

The major problem in relying on this incidence test grows out of changes in the nature of political violence. First, there has been a significant increase in the incidence of violent opposition. This increase in violence is exacerbated in international terms by enhanced mobility enabling more opposition forces to reach foreign jurisdictions.[5]

Second, the nature of opposition activity has changed. Violent opposition is now as likely to focus on non-governmental as governmental targets. Not only government officials but also landowners, business leaders, and often ordinary citizens become the targets of political violence. This violence may be conducted outside the borders of the nation against representatives of either a regime or a social order. Generally referred to as terrorism,[6] this type of violence differs from the historical pattern of "rebellion" on which the jurisprudence of the political offense exception is based. The incidence test, however, has failed to meet this change in the pattern of political action by not providing a workable distinction between terrorism and political rebellion.

In tracing this ambiguity in the law, this Article traces the historical development of the political offense exception, showing how this international norm has been applied in different national jurisdictions. Contrasts among British, Swiss, and French law are made and each is compared with the United States version of the political offense exception. This Article argues that the ambiguous distinction between rebellion and terrorism has complicated the application of the political offense exception. As a result, a fundamental tension exists between the goals of

ment. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1963); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) *reh'g denied* 409 U.S. 897 (1973).

5. *See, e.g.*, Lauter, *There's No Place to Hide: Extraditions Have Tripled, and It's Only the Beginning*, 7 NAT'L L. J. 1, col. 1 (Nov. 26, 1984).

6. There is no standard definition of "terrorism," and the various formulations are subjects of intense controversy. *See, e.g.*, Lubet and Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 195, n. 17 (1980). Some commentators have suggested that the definition is inherently circular. *See, e.g.*, Schwarzenberger, *Terrorists, Guerrillas, and Mercenaries*, TOLEDO L. REV. 71, 72 (1971). As used in this article, terrorism refers to violence against private individuals and groups not directly responsible for the actions of the government. This definition does not preclude treating acts of governments as terrorism against their own citizens. *See, e.g.*, U.N. Rep't of the Ad Hoc Comm. on Int'l Terrorism, G.A.O.R. 28th Sess. Supp. 28 [A-9028] at p.15.

One definition of terrorism notes that there are three characteristics of terrorism: a violent, criminal act; toward an impersonal target; with a motive of striking widespread fear (terror) within the community. One must distinguish whether the "nationalistic struggle for self determination and revolutionary theory" is a spur to the acts or a rationalization for them. NAT'L ADVISORY COMM. ON CRIM. JUSTICE STANDARDS AND GOALS, DISORDERS AND TERRORISM 3, 22 (1976).

preserving neutrality in foreign conflicts and of deterring transnational terrorism. This Article proposes a new functional test to modernize the incidence test. This new test reconciles neutrality and anti-terrorist goals in a manner consistent with the courts' refusal to inquire into the legitimacy of the foreign government requesting extradition.

I. Overview of the Political Offense Exception

The political offense exception removes the obligation to extradite when the actions for which the individual is being charged are part of a course of conduct associated with general political offenses such as treason, sedition, or espionage. Although the specific actions charged may be criminal offenses such as murder or arson, they are rendered political by virtue of the context in which they occur.

In analyzing the context of the action, courts have recognized both "pure" and "relative" political offenses.[7] The distinction, which has never been absolute, is based on consideration of the target and the means used. A pure political offense is defined largely in terms of its target — government officials or the regime of official power. The relative political offense has elements of a common crime, perpetrated in a political context, and may be directed at non-governmental as well as governmental targets.

The relative political offense exception raises the problem of defining "political." The courts are now confronted with a virtually unbounded concept of the political as individuals or groups use violent means against a wide range of targets to serve political ends. The theory of the political offense exception has not yet adequately incorporated these changes in targets and means.

A completely unbounded concept of the political offense would destroy the system of international extradition. The challenge is to develop a standard that distinguishes between contemporary political action and terrorism. Courts have tended to base this distinction on unspecified assumptions which imply that factors of political expedience or other standards are taken into account. As a result, the goal of neutrality has been undermined by according primacy to the goal of preventing terrorism. The danger in this approach is that the concept of terrorism will become so expansive that it becomes merely a code word for actions that are inconsistent with the momentary foreign policy positions of the state acting on the request for extradition. The political offense exception would

7. *See* Banoff & Pyle, *"To Surrender Political Offenders": The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U. J. INT'L L. & POL. 169, 178 (1984).

no longer serve to preserve international neutrality and to protect individual rights, but would instead become merely one more foreign policy tool in the hands of governments.

II. Origin of the Incidence Test in the English Common Law

The British approach to the political offense exception can be traced to *In re Castioni*.[8] That case involved the Swiss government's extradition request for Angelo Castioni, a Swiss national accused of fatally shooting a government official. Castioni admitted the shooting but claimed exemption under the Extradition Act of 1870,[9] which forbade extradition for acts of a "political character" while leaving the term undefined.[10] The shooting had occurred during a political disturbance in the canton of Ticino. Citizens in the town of Bellizona had for some time been dissatisfied with the political party controlling the government. They revolted when that party refused to revise the Ticino constitution upon the petition of 7000 citizens as required by that constitution. The townspeople seized the local arsenal and stormed the town palace. Castioni was among the first to enter; he shot a government official who had offered no active resistance.

The Queens Bench found that Castioni had committed an offense of a political character. In reaching its decision, the court adopted the "incidence test." The test requires that an act be perpetrated in the course of and in furtherance of a widespread political uprising;[11] hence, the test requires that a court inquire into the circumstances surrounding an offense.[12] Though perhaps inconsistent with the outcome of the case, the court emphasized that an act satisfies the test only when it is in furtherance of a political uprising rather than merely incidental thereto.[13]

8. [1891] 1 Q.B. 149.

9. Extradition Act of 1870, 33 & 34 Vict., ch. 52.

10. The Extradition Act of 1870 provides in relevant part:

> A fugitive criminal shall not be surrendered if the offense to which he is surrendered or demanded is one of a political character or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State that the requisition for his surrender has in fact been made with a view to try to punish him for an offense of a political character.

Id.

11. *Castioni*, at 156.

12. *Id.* at 155 (Dennan, J.):

> [I]t is [not] necessary or desirable that we should attempt to put into language the shape of an exhaustive definition exactly the whole state of things or every state of things which might bring a particular case within the description of an offense of a political character.

13. *Id.* at 155, 165. Justices Dennan and Hawkins explicitly rejected an interpretation of the Extradition Act of 1870 proposed by John Stuart Mill implying that any act occurring during a political uprising may be a political offense irrespective of the perpetrator's object and

Political Offense Exception

The Queen's Bench elaborated on the incidence test in *In re Meunier*.[14] Meunier was an avowed anarchist sought by the French government for the bombings of a Parisian cafe and a military barracks. Two people were killed in the cafe attack. Meunier challenged the sufficiency of the evidence linking him with the cafe bombing and asserted that the bombing of the military barracks was an offense of a political character under the Extradition Act of 1870.[15] Justice Cave rejected Meunier's assertion and declared that the incidence test requires the existence a political uprising in which two or more factions vie for control of the government. Accordingly, random violence of the type used by an anarchist could never constitute a political offense since it does not further the interests of a faction.[16]

Together, *Castioni* and *Meunier* delimit the political offense exception where violence has been committed with a political purpose. The Extradition Act, however, also disallows extradition when the request is made "with a view of trying or punishing them for an offense of a political character."

In *Ex parte Kolczynski*[17] the Queen's Bench interpreted this to authorize the courts to inquire into the motive of a state requesting extradition. *Kolczynski* involved the seizure of a Polish fishing trawler by a group of its crewmembers. The vessel had been part of the Polish fishing fleet in the North Atlantic on which a party secretary "was stationed to monitor loyalty." Some of the crew members believed that upon return to Poland, they would become victims of political persecution. After a mutiny in which no serious injuries occurred, these crew members diverted the trawler to Britain. Polish authorities demanded extradition, charging the crew members with common, non-political crimes analogous to mu-

intention. The term "incidence test" thus may be somewhat misleading. It derives from an earlier interpretation of the Extradition Act by Justice Stephen, the third *Castioni* judge:

> [T]he expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.

2 J. STEPHEN, HISTORY OF THE COMMON LAW OF ENGLAND 70-71 (1883).

14. [1894] 2 Q.B. 415.
15. Extradition Act of 1870, 33 & 34 Vict., ch. 52.
16. [1894] 2 Q.B. 415, 419. Justice Cave explained:

> [T]here must be two or more parties in the State, each seeking to impose the Government of their own choice on the other in pursuance of that object, it is a political offense, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other; for the party with whom the accused is identified. . . the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens.

Id.

17. Regina v. Governor of Brixton Prison, ex parte Kolczynski, [1955] 1 Q.B. 540.

tiny and kidnapping.[18]

Britain refused extradition. The accused seamen were allowed to introduce evidence suggesting that they would, in fact, be punished for treason if returned to Poland. On writ of habeas corpus, the Queen's Bench found this evidence sufficient to establish that Poland's motive was to punish the accused for offenses of a political character; thus the court found that the Extradition Act required nonextradition. The Justices of the Queen's Bench justified the denial of extradition because Poland intended to try the accused for treason rather than for the common crimes upon which it had based its request.[19]

Kolczynski illustrates the impossibility of applying the political offense exception without considering the motives of the government requesting extradition. It also foreshadows the difficulty of preserving both the system of extradition and the political offense exception as the concept of political action expands beyond rebellion of the types covered in *Castioni*. As *Meunier* illustrated, once the action moves beyond this classic example of political opposition to the government, the courts are left with little to guide them in their attempts to define political actions that justify a principled refusal to grant a request for extradition.

III. The Predominant Political Motivation Test in Swiss Law

Swiss courts have taken a comparatively sophisticated approach to the determination of whether an act constitutes a political offense. The "political motivation" test looks into the subjective motivation of the accused and mandates nonextradition for political motivation when two conditions are satisfied. First, the act for which extradition is sought must have been directly related to furthering a goal of a political move-

18. *Id.* at 543. The precise allegations were: use of force, depriving the captain and other crew members of their freedom, wounding the party secretary, damaging the ship radio, preventing the captain from commanding the ship, and exposing the ship and crew to the danger of calamity at sea.

19. Issues such as whether the accused will receive a fair trial in the country demanding extradition and whether the accused will be tried for offenses other than those for which he has been found to be extraditable have consistently been labelled "humanitarian considerations" which only the State Department has competence to consider. *See, e.g.*, Neely v. Henkel, 180 U.S. 109 (1901); In re Lincoln, 228 F. 70, 74 (E.D.N.Y. 1915), *aff'd per curiam* 241 U.S. 651 (1916); In re Gonzales, 217 F. Supp. 717, 722-23 (S.D.N.Y. 1963).

Dicta in recent cases, however, suggest that repudiation of the "rule of noninquiry" is possible in extraordinary cases. *See* Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) *cert. denied*, 364 U.S. 851 (1960) ("We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle."); *Cf. also* Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980) (Prisoners convicted of crime in Mexico and serving out sentences in the United States pursuant to Mexican-American Treaty on Execution of Penal Sentences had right to challenge Mexican trial procedure but had waived the right.)

ment. Second, the "predominance theory," requires that the political element of an act be greater than the common crime element so that unnecessary injury or cruelty is avoided.

This Swiss approach was established in *In re Ockert*.[20] That case involved the German government's extradition demand for a German national whom it accused of having murdered a member of the National-Socialist (Nazi) party. At the time of the incident in question, Ockert had been active in the Reichsbanner, the paramilitary arm of the Social-Democratic Party that opposed Nazi dogma. Ockert had, indeed, shot a Nazi during the course of a street clash between members of their respective parties.

The Federal Tribunal found that Ockert's political motivation placed the act under the political offense exception of the Swiss international extradition statute.[21] The Federal Tribunal's opinion did not consider whether the shooting was significantly related to the objectives of the Social-Democratic Party. Thus, *Ockert* is silent as to the limits of the applicability of the political offense exception to acts motivated by subjective political beliefs.[22] Such limits had, however, been set forth in an earlier decision.

In *In re Kaphengst*,[23] the Federal Tribunal acceded to the German government's demand for a German national who was charged with exploding a series of bombs at public sites and injuring several civilians. Though Kaphengst's motivation was political, he was not associated with a political movement. Noting this, the Federal Tribunal held that the political offense exception applies only to acts that are proximately related to an organized attempt to overthrow a government. Random acts of violence would never further such an objective, and therefore fall outside of the exception.[24]

A similar limitation of *Ockert* may be drawn from the *Wassilief*[25] case. There the Federal Tribunal decided that acts that are unnecessary or out of proportion to a political objective cannot constitute political offenses. Even assuming that the political motivation of the accused is to further

20. 59 BG I 136; 7 Ann. Dig. 369 (Switzerland, Fed. Tribunal) (1933).

21. Swiss-German Extradition Treaty of 1874, Art. I(I); *Id.* at 369.

22. *See* Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

23. 56 BG I 457; 5 Ann. Dig. 292 (Switzerland, Fed. Tribunal) (1930).

24. *Id.* at 293-94. The court stated:

> The practice of the Federal Court in regard to extradition showed that the Court always refused to attribute the character of a political offense to purely terroristic acts which were not mere episodes in the course of an action aiming at an immediate overthrow of the state.

25. Decided April 13, 1908, *reported in* [1909] FOR. REL. U.S. 519 (1914).

the cause of a political movement that seeks to control the state, the Tribunal found that a violent act is not automatically a political offense. In effect, this approach affords the Swiss judiciary wide discretion to inquire into the relevant circumstances of a case.

In re Kavic,[26] for example, rejected the Yugoslavian government's extradition demand for Yugoslavian nationals who had hijacked a plane to Switzerland despite the absence of past political activity on the part of the accused or of any widespread political insurrection in Yugoslavia. The Federal Tribunal found that, in light of the totalitarian nature of Yugoslavia, the political element of the hijacking predominated over the common crime element.[27]

Cases like *Kaphengst* and *Kavic* illustrate that political offense jurisprudence cannot rest solely, or even principally, on an appraisal of subjective motivation. *Kaphengst*'s approach to terrorism is strikingly similar to that taken by the British court in *Meunier*;[28] neither court will invoke the political offense exception in cases where the link between the political motivation and the target of violence is tenuous, or where the political motivation itself is ill-defined or unrelated to a struggle for political power.

To the extent that the predominance approach requires careful scrutiny of the circumstances surrounding political violence, it permits reconciliation of all the interests raised by the political offense exception. Yet, unless courts develop criteria for determining whether a political conflict exists, the Swiss approach could become *ad hoc* and discretionary, thereby making it more a political tool of foreign policy than a judicial standard for balancing the interests involved in the political offense exception.

IV. The Incidence Test in American Law

The American approach corresponds in key respects to the British approach. American courts have adopted the incidence test in determining whether an alleged crime actually constitutes a political offense. How-

26. 78 ATF I 39; 19 Ann. Dig. 371 (Switzerland, Fed. Tribunal) (1952).

27. 19 Ann. Dig. *supra* note 26, at 374. The court stated:

[T]he relation between the purpose and the means adopted for its achievement must be such that the ideals connected with the purpose are sufficiently strong to excuse, if not justify, the injury to private property, and to make the offender appear worthy of asylum. . . . Freedom from the constraint of a totalitarian State must be regarded as an ideal in this sense. In the present case the required relationship undoubtedly exists; for, on the one hand, the offences against the other members of the crew were not very serious, and, on the other, the political freedom and even existence of the accused was at stake, and could only be achieved through the commision of these offences.

28. *See supra* notes 14-16 and accompanying text.

ever, unlike the British courts, American courts have refused to consider the motives of a state requesting extradition.

The incidence test was first applied by an American court in the case of *In re Ezeta*.[29] That case involved the Republic of Salvador's extradition request for its former President, Antonio Ezeta, and four former military officers. Salvador accused these men of having committed murder, robbery, and arson. Each of the charges arose from actions that Ezeta and his officers had taken in a desperate attempt to subdue the violent revolutionary movement that eventually overthrew Ezeta's government. In particular, the murder charges stemmed from the execution of four persons who had refused to defend the regime against revolutionary forces. The robbery charge involved funds Ezeta had stolen to pay his troops.

Article III of the extradition treaty between Salvador and the United States imposed no obligation to return political offenders.[30] The court, while refusing to speculate as to Salvador's motives, denied the extradition demand. Judge Morrow reasoned from the holding of the *Castioni* decision that Ezeta's actions had been in furtherance of a struggle to maintain his government and were therefore political.[31]

Two years after *Ezeta* the Supreme Court decided its only political offense case. In *Ornella v. Ruiz*,[32] the Mexican government demanded the extradition of three Mexican nationals who had crossed the Mexican border from Texas with a band of armed men. The band had attacked a small contingent of Mexican soldiers that had sought to impede its progress, and proceeded to raze and loot the village of St. Ignacio.

Mexico charged the three men with murder, kidnapping, arson, and robbery. A federal magistrate found the accused to be extraditable.[33] On

29. 62 F. 972 (N.D. Cal. 1894).

30. The article read in relevant part: "The provisions of this treaty shall not apply to any crime or offense of a purely political character." "Political character" was undefined. Mexico-United States Extradition Treaty of 1862.

31. *Ezeta* was decided under the prior extradition statute. The statute did not expressly authorize the judiciary to apply the political offense exception provisions that were contained in treaties, but did provide for judicial determination of whether probable cause existed to extradite an accused person. *Ezeta* held that this probable cause hearing provision of the statute required the courts to interpret treaties and thereby empowered them to apply the political offense exception. 62 F. 972 (N.D. Cal. 1894).

32. 161 U.S. 502 (1896).

33. *Id.* at 503-04. The magistrate apparently was influenced in his decision by a letter from Secretary of State Greshaw to the Mexican Foreign Minister which read in relevant part:

> The idea that these acts were perpetrated with *bona fide* political or revolutionary designs is negated by the fact that immediately after this occurence, though no superior armed force of the Mexican government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas.

Id. at 511.

writ of habeas corpus, a district court reversed and held that the accused had committed political offenses.[34] The Supreme Court reinstated the magistrate's judgment on the ground that the district court had gone beyond the scope of habeas review and that the magistrate's decision was not clearly erroneous.[35] Although the Court did not expressly rule on the applicability of the political offense exception to the facts of the case, it did note in *dicta* that the band's immediate withdrawal into Texas, despite the absence of a superior Mexican force in the area, supported the magistrate's finding. In short, the band's rampage did not rise to the level of a political uprising.

Until *Kardzole v. Artukovic*[36] the American judiciary had not been presented with an opportunity to establish a clear line of demarcation between political violence that furthers a political uprising and violence that is merely contemporaneous with such an uprising. Unfortunately, the *Artukovic* court only further obscured this distinction.

Artukovic had been Minister of the Interior of the pro-Nazi government of Croatia during World War II. Croatia was the state entity created in 1941 from what had been Yugoslavia. It came into being just prior to the German invasion when the leaders of the Yugoslavian government fled the country. The new Croation rulers exploited their position to persecute their historical rivals, the Serbs. Thoughout World War II, various factions sought control of the government.

After the war, Artukovic fled to the United States and the reconstructed Yugoslavian government sought his extradition on charges of having ordered the execution of two hundred thousand prisoners in Croation concentration camps. The district court for the Northern District of California denied Yugoslavia's request and found that Artukovic had committed political offenses as part of a political uprising.[37] The Ninth Circuit affirmed.[38] Writing for the court, Judge Stephens found it significant that Artukovic had not personally killed anyone but had instead ordered the executions in his official capacity. This, the judge reasoned, was a political offense in the context of a struggle to establish and

34. *Id.* at 504.

35. *Id.* at 508. The court instructed that the scope of habeas corpus review of an extradition magistrate's decision was limited to: (1) whether the magistrate had jurisdiction; (2) whether the offense charged was listed as an extraditable offense in the relevant treaty; and (3) whether there was at least legal evidence supporting the magistrate's decision. *Id.*

36. 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated per curiam*, 355 U.S. 393 (1958), *remanded sub nom.* United States ex rel Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

37. Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956).

38. Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957).

maintain a government in wartime.[39] The court dismissed Yugoslavia's argument that the executions nevertheless constituted war crimes, remarking only that the applicability of international proscriptions against war crimes to the political offense exception had not been established.[40]

Artukovic weakens the incidence test, and cannot be reconciled with the historical purpose of the political offense exception. The decision ignored the civilian status of the victims and failed to inquire whether mass killings were actually necessary to maintain the Croatian governments.[41] Failure to distinguish between violence that is in furtherance of, rather than merely contemporaneous with, a political uprising transforms the incidence test into a license for gratuitous killing.[42] The trend of cases such as *Ezeta* and *Artukovic* seems to indicate that United States courts will lower the threshold for the application of the political offense exception for those individuals associated with a regime or government that has fallen from power. By skewing the standards for particular groups in this way, such an approach may jeopardize the neutrality that the political offense exception doctrine seeks to maintain. Cases following *Artukovic* demonstrate a somewhat surprising application of the political offense exception. *Ramos v. Diaz*[43] involved the Cuban government's extradition request for two of its nationals, Diaz and Cruzata, who had formerly served as military prison guards. The extradition request alleged that Diaz and Cruzata had shot and killed a prisoner as he attempted to escape from a garage that served as a makeshift prison. The incident occurred in 1954, just after the fall of the Batista regime. The new Castro government had wanted to interrogate the prisoners and had issued a standing order mandating death to guards who failed to secure their charges.

The court held that the political offense exception applied and denied the Cuban extradition request. Judge Lieb observed that the killing of the political prisoner constituted as much of a political uprising as did the killing involved in *Castioni*.[44] *Ramos* is the only American case to have applied the political offense exception to offenders who were on the same side of a political uprising as were those requesting extradition. Legal realist theory might explain the decision as the result of antipathy for the

39. *Id.* at 204.

40. *Id.* at 204-06. The court believed that the existing instruments purporting to establish a duty to surrender war criminals had not gained sufficient force of law to modify "longstanding interpretation of similar treaty provisions." *Id.* at 205.

41. *Id.* at 204.

42. *See* Lubet & Czackes, *supra* note 6 at 205.

43. 179 F. Supp. 459 (S.D. Fla. 1959).

44. *Id.* at 462-63.

Castro regime. This explanation does not resolve the confusion *Ramos* created over the criteria for determining the existence of a political uprising.

The only cases holding the political offense exception inapplicable because of the factual nonexistence of an uprising arose in situations where these facts were not at issue. *In re Gonzalez*[45] held that no uprising was in progress in the Dominican Republic when military prison guards killed two prisoners. Similarly, *Escobedo v. United States*[46] held two United States nationals extraditable to Mexico for the attempted kidnapping and murder of a Cuban consular official despite their claim that they had planned to ransom the official for political prisoners in Cuba.[47]

The foregoing review of the case law illustrates that the traditional American approach to the political offense exception has been somewhat problematic. Comparison of *Ramos* and *Gonzalez*, where the courts reached contradictory conclusions on very similar fact patterns, illustrates the lack of a consistent and principled jurisprudence. The results suggest an approach more concerned with political needs and realities than with a principled application of the incidence test. The search for a more consistent jurisprudence has led to the incorporation of elements of the Swiss predominant political motivation test.

This shift toward the Swiss approach is seen in *Abu Eain*,[48] perhaps the most doctrinally significant decision since *Castioni*. The *McMullen*[49] and *Mackin*[50] cases address the complex issue of determining the existence of a political uprising.

In *Abu Eain* the accused was a Jordanian national and a member of the Fatah faction of the Palestine Liberation Organization (PLO). The government of Israel sought his extradition for his alleged participation in the bombing of a marketplace in Tiberias during a Jewish religious festival and youth rally. Two Israeli boys died and thirty-six other persons were injured in the explosion. A United States federal magistrate in Illinois rejected Eain's claim that the act was a political offense and

45. 217 F. Supp. 717 (S.D.N.Y. 1963).

46. 623 F.2d 1098 (5th Cir. 1980).

47. *Id.* at 1104. Judge Anderson instructed: "This circuit defines a political offense under extradition as an offense committed in the course of and incidental to a violent political disturbance, such as war, revolution and rebellion. . . . An offense is not of a political character simply because it was politically motivated." (citations omitted). *Id.*

48. In re Extradition of Ziyad Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (mem.), *habeas corpus denied sub nom*, Abu Eain v. Adams, 529 F. Supp. 685 (N.D. Ill. 1980), *aff'd sub nom.* Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

49. In re Extradition of McMullen, No. 3-78-1099 MG (N.D. Cal. May 11, 1979).

50. United States v. Mackin, 668 F.2d 122 (2d Cir. 1981).

found him extraditable.[51] The magistrate found unpersuasive Eain's argument that the bombing of a civilian target was a relative political offense in light of the PLO's long struggle to create a "democratic nonsectarian state" in place of Israel.[52]

The magistrate found three areas of relevant inquiry: (1) the offender's past participation in a political movement; (2) the existence of a connection between the crime and a political objective; and (3) the proportionality of the crime to the political objective.[53] Accordingly, the magistrate held that, although Eain had been active in an organization with clearly defined political goals, there was no connection or proportionality between the PLO's political agenda and the use of violence against civilian targets.[54]

Following an unsuccessful habeas corpus petition to the district court,[55] Eain appealed to the Seventh Circuit Court of Appeals. In affirming the district court's disposition, Judge Woods handed down a landmark decision,[56] significant both for its defense of judicial competence to decide political offense questions and for its substantive contribution to the analysis of these questions.

The government argued that the courts could not apply the political offense exception because such inquiries present political questions and also because the terms of the United States-Israel extradition treaty[57] require the Executive Branch to apply the exception. In addition, the government suggested that it was irrational for the courts to decide whether particular acts constitute political offenses while not inquiring into the motives of a state requesting extradition. Judge Wood rejected both arguments.[58] Determination of the applicability of the political offense exception does not, as the government argued, require "an initial policy determination of a kind clearly for nonjudicial discretion."[59] On the contrary, Judge Wood reasoned, a judge may determine the applicability of the exception through objective findings of past fact, such as whether a violent controversy existed at the time an act was perpetrated. Though

51. In re Extradition of Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (mem.)
52. *Id.* at 12-13.
53. *Id.* at 19-21.
54. *Id.*
55. Abu Eain v. Adams, 529 F. Supp. 685 (N.D. Ill. 1980).
56. Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).
57. 14 U.S.T. 1707, Art. VI(4) (1963).
58. Eain v. Wilkes, 641 F.2d at 513-14.
59. *Id.* Judge Wood remarked:

> The existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not.

Id.

the State Department may possess a superior ability to gather information regarding the intensity of foreign political disturbances, it can readily share such information with the courts through *in camera* review procedures. Hence, there need be no embarrassment to the executive in the exercise of foreign policy because the executive may consult with the court and because the court's inquiry is limited to factual matters.

Judge Wood also disagreed with the government's interpretation of the United States-Israel extradition treaty as placing the political offense issue within the exclusive purview of the executive. The judge found that judicial construction of extradition treaties had long been a major procedural safeguard for accused persons and that there was little indication that the drafters of the treaty had intended to withdraw that protection.[60] Finally, Judge Wood distinguished the question of whether an act constitutes a political offense from the characterization of a state's motivation in demanding extradition. The latter function calls for policy determinations that are clearly inappropriate for courts, and it is therefore not surprising that courts follow the rule of noninquiry.[61]

Having established its competence to consider the issue, the court proceeded to discuss the appropriate test for applying the political offense exception. Initially, Judge Wood questioned the magistrate's implicit assumption that the Israeli-Palestinian dispute constituted a political uprising.[62] It was far from obvious, in the court's view, that the traditional conception of a political uprising could be extended to the Israeli-Palestinian dispute, inasmuch as the PLO's tactics were more terrorist than conventional.[63] It was, however, unnecessary to decide the issue because the magistrate had properly ruled that there was no connection or proportionality between the killing and maiming of civilians and the PLO's political goals. In reviewing this conclusion, Judge Wood used the lan-

60. Judge Wood said:

> [O]ne constant in American extradition law is that the magistrate is to make the initial determination in the extradition process. We hesitate to hold on so slim a record as is available on the intent of the drafters of the Treaty in this case that the major procedural safeguards established to protect the defendant's rights have been deliberately written out of the document.

Id. at 518, *quoting* Berenguer v. Vance, 473 F. Supp. 1195, 1198 (D.D.C. 1979).

61. *Id.* at 516.

62. *Id.* at 519.

63. *Id.* Judge Wood remarked:

> The nature of that [Israel-P.L.O.] conflict is somewhat different than disturbances that have been considered in other cases where resistance to extradition on grounds of a political offense exception have been sustained. Those cases involved on-going, organized battles between contending armies.

Id., *citing* Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959); United States v. Artukovic, *supra* note 36.

guage of the traditional incidence test,[64] but did not end the analysis there. He went on to note that indiscriminate attacks on civilian targets are really directed at the social, not the political, structure.[65] Such random violence can never, the court concluded, advance a political cause.[66]

Abu Eain is a decision of great doctrinal importance. It refines the incidence test and incorporates the proportionality approach of the Swiss courts. Subsequent cases follow *Abu Eain* in refusing to apply the political offense exception to violence against civilians. However, the case did not settle the question of what scale of violence or degree of discontent might constitute a political uprising.

The *McMullen*[67] case, a decision contemporaneous with *Abu Eain*, concerned the United Kingdom's extradition request for Peter McMullen. The request alleged that McMullen had participated in the 1972 bombing of a British army barracks in North Yorkshire, England. McMullen had had a history of involvement with the Provisional Irish Republican Army (PIRA) , beginning in 1972, after his desertion from the British army. In 1974, McMullen had been convicted by an Irish court of membership in the PIRA and of carrying firearms. He was sentenced to three years in prison. Following his release, the PIRA sought to recruit McMullen for further service, and threatened reprisals when he declined. McMullen escaped to the United States in 1978 and was arrested for carrying a false passport. Scotland Yard detectives were allowed to question him, and he provided information about his participation in past PIRA activities. Thereafter, the United Kingdom demanded his extradition.

A federal magistrate in the Northern District of California applied the political offense exception and found McMullen nonextraditable.[68] Two aspects of the decision are important. First, the magistrate found that a political uprising had existed in Northern Ireland during 1972.[69] This conclusion was based on the PIRA's longstanding goals of independence from Ulster, the presence of British troops in Northern Ireland, the termination of home rule, and the history of political violence in the region.

64. *Abu Eain*, 641 F.2d at 520.

65. The definition of "political disturbance", with its focus on organized forms of aggression such as war, rebellion and revolution, is aimed at acts that disrupt the political structure of a State, and not the social structure.

Id.

66. *Id.* at 521.

67. In re Extradition of McMullen, No. 3-78-1099 M (N.D. Cal. May 11, 1979).

68. *Id.* at 4.

69. *Id.* at 6. U.S. Magistrate Frederick J. Woefler said:

[McMullen] acted as a member of PIRA, his activities were directed by persons in authority in the PIRA, and the bombing was a crime incidental to and formed as a part of a political disturbance, uprising or insurrection and in furtherance thereof.

Id.

Second, the magistrate applied the second half of the *Castioni* test to find that the bombing had been incidental to the PIRA's political objectives. *McMullen*[70] was the first decision to advance criteria for determining whether a political uprising exists. It conducts a contextual analysis in an attempt to determine what political claims have been asserted within the demanding state and what political struggles or disturbances have resulted from the attempted assertion of these claims.

Development of this approach was continued in another case that involved the British and the PIRA, *In re Mackin*.[71] Desmond Mackin was a member of the PIRA whom the United Kingdom accused of wounding a British soldier in a 1978 gunfight between PIRA members and British troops in Belfast.[72] A federal magistrate in the Southern District of New York denied the United Kingdom's extradition demand on the ground that Mackin's action constituted a political offense.[73] The magistrate found that the PIRA had been conducting an uprising in Belfast at the time of the shooting and that Mackin's action was incidental to that uprising.

The United States brought an appeal and, in the alternative, a request for mandamus in the Second Circuit Court of Appeals. Judge Friendly held that the U.S. international extradition statute[74] did not permit the government to appeal from a finding of nonextraditability,[75] and that mandamus was inappropriate because the magistrate's disposition was clearly within her jurisdiction. The opinion does not explicitly address how political offenses should be analyzed, but does consider the government's argument that the extradition treaty between the United States and Britain vested sole competence to consider the political offense exception in the executive.[76] Judge Friendly first approached the issue in a

70. The Immigration and Naturalization Service subsequently attempted to deport McMullen to Northern Ireland. McMullen claimed that his deportation would violate § 243(h) of the Immigration and Naturalization Act, 8 U.S.C. § 1254, which forbids the deportation of persons likely to suffer political persecution. McMullen's claim was based on the assertion that the authorities in Ireland could not prevent the PIRA from harming him. The district court for the Northern District of California agreed and disallowed his deportation. McMullen v. Immigration and Naturalization Service, No. 278-1099 MG (N.D. Cal. 1980), *aff'd* 658 F.2d 1312 (9th Cir. 1981).

71. *Supra* note 50.

72. The extradition request by Britain and Northern Ireland charged Mackin with attempted murder, wounding a soldier with intent to do grievous bodily harm, and illegal possession of firearms.

73. *Supra* note 50 at 124-25.

74. 28 U.S.C. § 1291.

75. *Supra* note 50 at 125-30.

76. 28 U.S.T. 227, T.I.A.S. 8468. Art. V(1)(c)(i) of the treaty provides:

> Extradition shall not be granted if:. . . the offense for which extradition is requested is regarded by the *requested Party* as one of a political character. (emphasis added)

manner similar to that of Judge Wood in the *Abu Eain* case, noting that there had been no showing that the drafters of the treaty had intended to deviate from the longstanding provision for judicial scrutiny of political offense claims.[77] Judge Friendly then examined the history of U.S. international extradition statutes and found that Congress had always contemplated an initial determination of the political offense issue by the judiciary.[78]

The foregoing review indicates that the recent political offense exception cases are significant for two reasons. First, the courts that have confronted the issue have declined to alter the existing allocation of competence between the judiciary and the executive.[79] Neither the *Abu Eain* nor the *Mackin* courts found the political question doctrine to be a constitutional impediment to judicial consideration. In addition, neither court would interpret the extradition treaty before it in a manner that would limit its jurisdiction. Thus, it appears that the policies underlying the provision of procedural safeguards can only be disavowed through an express act of Congress.

Second, the cases reformulate the traditional incidence test. *Abu Eain* set forth a contextual examination of the act at issue to determine whether it could have furthered a political goal. This establishes a trend

The government interpreted the term "requested Party" to refer only to the executive.

77. Judge Friendly noted that, in enacting America's first extradition statute, the Extradition Act of 1848, Congress explicitly provided for a judicial hearing to determine whether an extradition charge could be supported by the evidence. The Judge further noted that Congress had been shocked by the extradition without judicial process of Jonathan Robbins to Britain for what appeared to be political offenses and intended to erect safeguards against similar occurrences. *Id.* at 134-35.

78. The current United States statute concerning international extradition, 18 U.S.C. § 3184, allows the representatives of a foreign nation with which an extradition treaty is in force to request the return of a fugitive by presenting a copy of the foreign complaint, together with affidavits and other supporting materials, to a federal or state magistrate in the district where the accused is believed to be present. The modern trend is for the foreign government to submit the request for extradition and supporting materials to the State Department, which, after evaluation, forwards the papers to the United States Attorney in the district where the person sought to be extradited may be found. The United States Attorney then files the complaint, seeks an arrest warrant from the magistrate, and argues on behalf of the requesting state. While the scope of the hearing before the magistrate is limited to determining whether the claimed offense is within the applicable treaty, the magistrate must also consider the applicability of the political offense exception as specified in the treaty. Should the magistrate find that he cannot certify the matter to the Secretary of State for extradition, the judgment is final, and neither the requesting foreign government nor the Secretary of State may take a direct appeal from the magistrate's decision. However, should the magistrate find the person extraditable, the Secretary retains the right to overturn that finding if the Secretary determines that the requesting state seeks to punish the accused for a political offense rather than for common crimes. *See* Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 27 (1968); Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1316 (1962).

79. *See supra* notes 55-59 and accompanying text.

away from the application of the political offense exception, as seen in cases like *Artukovic*, and suggests that courts should consider the target and means to determine whether the violent acts were reasonably related and proportional to a group's political ends. Furthermore, the *McMullen* case departed from prior case law in its attempt to assess the PIRA's political goals in light of claims being made by other groups in the larger society.

Despite these significant refinements made in the recent cases, the incidence test remains an incomplete analytical framework for application of the political offense exception in the context of modern political violence. The analysis must move beyond *McMullen* and *Mackin* to define a political uprising so that courts can apply the standards of proportionality and reasonableness in determining whether the actions under consideration are reasonably related to achieving the goals of such a political uprising. Such a clarification is necessary, because, as *McMullen* and *Mackin* demonstrate, cases will inevitably arise where decisions cannot be based solely on the status of the targets of violence. The problems inherent in this approach are illustrated by French efforts to develop an "objective test" based on the nature of the targets of violence.

V. The Objective Test in French Law

Precise statement of the French approach is difficult because the jurisprudence has been inconsistent and often has appeared to attach determinative significance to foreign policy imperatives, to the exclusion of the other interests implicated in the political offense exception. Nevertheless, the approach is commonly described as following an "objective test" that directs inquiry to the character of the target of an act for which extradition is sought. Only acts that impact solely on a government are supposed to be political offenses.

The leading case defining the objective test is *In re Giovanni Gatti*.[80] Gatti was a national of the Republic of San Marino who had been sentenced in that country to a twelve-year prison term for the attempted murder of a communist. Gatti sought to defend against extradition to San Marino through a demonstration that his acts had been politically motivated. Though the French international extradition statute appeared broad enough to forbid extradition for political offenses,[81] the Cour

80. 14 Ann. Dig. 145 (Cour d'appel, Grenoble 1947).

81. The French Extradition Law of March 10, 1927 provides in relevant part:

d'appel did not inquire into the circumstances surrounding the incident[82] or into Gatti's subjective motivation. The Cour d'appel instead limited its inquiry to whether the act had impacted exclusively on the rights of the state.[83]

Gatti is anathema to the legislative intent behind the French international extradition statute because the statute was intended to mandate scrutiny of the circumstances surrounding an act and of the perpetrator's subjective motivation.[84] Indeed the language of the act itself directs inquiry not only into the relevant circumstances and the perpetrator's subjective motivation, but also into the motivation of the requesting government. Yet, the decision appears to recognize a political offense exception only for nonviolent, purely political offenses, since relative political offenses inevitably injure people or property rather than only abstract rights of the state.[85]

In the period immediately following *Gatti*, the French courts signficantly broadened the scope of the objective test. This trend began with *In re Rodriguez*,[86] in which the Cour d'appel of Paris refused the Spanish government's demand for the extradition of two of its nationals who had been members of a movement that sought to overthrow the Spanish government and whom it charged with arson and murder. Similarly, in *In re*

> [Extradition is not granted] when the crime or offense has a political character or when it is clear (resulte) from the circumstances that the extradition is requested for a political end.
>
> As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance. . . of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended.

Id. at title I, art. 5, para. 2, in *Harvard Research* 380-81, 29 AM. J. INT'L L. 380 (1935) (unofficial translation).

82. Had the Cour d'appel engaged in such an inquiry, it would have found that no immediate and large-scale political conflict existed at the time of the incident.

83. The Cour d'appel announced:

> Political offenses are those which injure the political organism, which are directed against the constitution of the government and against sovereignty, which trouble the order established by the fundamental laws of the state and disturb the distribution of powers. . . .What distinguishes the political crime from the common crime is the fact that the former only affects the political organization of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state. The fact that the reasons of sentiment which prompted the offender to commit the offense belong to the realm of politics does not itself create a political offense. The offense does not derive its political character from the motive of the offender but from the nature of the rights it injures.

14 Ann. Dig. 145, 145-46 (Cour d'appel, Grenoble 1947).

84. Carbonneau, *Terrorist Acts—Crimes or Political Infraction? An Appraisal of Recent French Extradition Cases*, 3 HASTINGS INT'L & COMP. L. REV. 265, 275-76 (1980).

85. *See*, Garcia-Mora, *supra* note 22 at 1250.

86. 2 GAZ. PALAIS 113 (Cour d'appel, Paris, 1953).

Hennin[87] the Cour d'appel of Paris rejected the Swiss government's demand for a Swiss national charged with arson against private property on the ground that the accused had committed the offense in a heated political climate.

Though the trend away from the formalism of the objective test facilitated consideration of the context of political violence, it failed to produce an analytical framework. The courts simply announced their conclusions without attempting to identify the dispositive characteristics of a relative political offense. It is thus not surprising that the phenomenon of modern terrorism has prompted movement towards an objective test that is once again formalistic.

The first notable French case that concerned modern terrorism was *In re Abu Daoud*.[88] The case involved West German and Israeli extradition requests for Abu Daoud, the reputed organizer of the 1972 massacre of members of the Israeli Olympic team in Munich. After Daoud's provisional arrest in France, he was released to Algiers and the extradition was denied on the ground of technical insufficiencies in the two extradition requests. West Germany's request was found insufficient because the West German arrest warrant had not been processed through proper diplomatic channels. Israel's request was insufficient because Daoud had not been charged with a crime within the scope of the France-Israel extradition treaty.

It has been suggested that the Cour d'appel's disposition of the case was preordained by the court's fear that holding Daoud might jeopardize a pending oil deal between France and Saudi Arabia and a defense supply contract being negotiated between France and Egypt.[89]

The *Klaus Croissant*[90] case marks the beginning of the French judiciary's attempt to establish a more principled, albeit still inflexible, jurisprudence. The case concerned West Germany's demand for a West German national who was the former attorney for operations in the Baader-Meinhof group. Croissant was charged with passing information between at large and imprisoned members of the Baader-Meinhof group while propagandizing on the group's behalf and participating in direct terrorist attacks.[91] The court found that there was insufficient evidence to link Croissant with any terrorist attack and declared that propagandizing was not a basis for extradition under the France-West Ger-

87. JURIS-CLASSEUR PERIODIQUE (J.C.P. II) No. 15274 (Cour d'appel, Paris, 1967).
88. 104 J. DR. INT'L 843 (Cour d'appel, Paris 1977).
89. *See* Carbonneau, *supra* note 84, at 284-86.
90. The decision of the Cour d'appel of Paris was not officially reported. For a journalistic account, *see* Le Figaro, Nov. 17. 1977, at 17, col. 3.
91. *See* Carbonneau, *supra* note 84, at 287.

many extradition treaty. The court did, however, grant extradition on the basis of the first charge which it found to constitute a common crime.

Though *Klaus Croissant* circumvented the most difficult issues on technical grounds, it does represent a significant development in French jurisprudence. The refusal to hold that Croissant's claimed political motivation transformed an otherwise common crime into a relative political offense may be seen to represent a return to the *Giovanni Gatti* formulation of the objective test.

This trend was continued in the *Piperno*[92] case. In *Piperno* the Italian government demanded the extradition of Franceso Piperno for his alleged participation in the kidnapping and murder of Aldo Moro. The requisition charged that Piperno had been involved in the incident while a member of the Red Brigade. The French court held that irrespective of political motivation, no political character can be ascribed to an act such as murder because of its seriousness.[93]

Thus the French judiciary has come full circle and seriously undermined the relative political offense exception in its efforts to deal with modern political violence. It remains unclear whether the French courts will refuse to apply the exception under any circumstances or whether the exception will cease to exist as a legitimate doctrine of law. The French response underscores the importance of developing criteria for distinguishing between terrorism and rebellion. Without such a distinction, maintenance of both the extradition system and the political offense exception will prove impossible.

VI. Issues in the Jurisprudence of the Political Offense Exception

General dissatisfaction with the case law has led to numerous scholarly and legislative proposals for change. Each of these proposals ad-

92. For an account of the case, see *Id.* at 291-96.

93. Carbonneau takes the position that *Klaus Croissant* and *Piperno* together represent movement towards that portion of the Swiss approach to the political offense exception that inquires into the proportionality between the asserted political goal and the means used to reach that goal. Using this analysis, Carbonneau's findings lead to the conclusion that terrorist violence can never be the basis of application of the exception since this violence rarely advances a legitimate political cause. Unfortunately, the commentator does not make clear how terrorism and rebellion are to be distinguished, except to suggest that certain very "serious" acts should never be considered political offenses. Carbonneau, *supra* note 84, at 290-97. This is essentially the approach taken in the European Convention on the Suppression of Terrorism, Jan 27, 1977, 15 INT'L LEGAL MATERIALS 233 (1977).

The problem with this approach is that many political uprisings do involve the use of firearms and killing. Carbonneau's approach, then, could lead to extinction of the political offense exception for all but pure political offenses or those relative political offenses that involve only property crimes.

dresses a facet of the problem, but none deals directly with the core issue of distinguishing a political offense from terrorism.

The most sweeping proposal is also the most facile: elimination of the political offense exception from extradition treaties.[94] The Secretary of State would, instead, use his discretion in granting requests for political asylum.[95] This political method faces no legal impediments, but it does raise questions as to its utility in the conduct of foreign policy, as well as questions of fairness to the person seeking asylum. This proposal would make it impossible for the United States to be or to appear neutral in any foreign controversy once a participant reached the United States and requested asylum. The decision would turn solely on the Secretary's assessment of the short-term political implications of his response. The Secretary would be forced to appear to have taken a position on a foreign political controversy.

Proposals to retain the political offense exception but to vest exclusive competence to apply it in the Secretary of State raise similar objections.[96] This approach rests on the assumption that the political offense exception is anachronistic and that the rights of the individual should be ignored in the interest of foreign policy goals of the United States.

Proposals to retain the political offense exception and to continue to vest competence in the judiciary to apply the political offense exception preserve the neutrality goal. These proposals differ in the degree of latitude permitted the judiciary and the means chosen to constrain that latitude. The greatest constraint would take the form of Congressionally mandated exclusions.[97] Such an approach has been suggested by Congress in recent legislative proposals.[98] Under this approach, Congress

94. *See, e.g.*, Epps, *The Validity of the Political Offense Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L. J. 61, 82-83 (1979) (political offense case law explicable only in political terms; accused individual's rights adequately protected through the executive's authority to grant political asylum).

95. American extradition treaties do not designate the branch of government which is to apply the political offense exception.

96. *See, e.g.*, Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 VA. J. INT'L L. 163, 178-83 (1981) (political offense exception protects rights of accused but should be implemented through State Department hearings).

97. S. 1639, 97th Cong., 1st Sess. (1981). The bill was introduced by Senator Thurmond. It provides that the courts may only consider whether the offense charged is on the list of extraditable offenses under the applicable treaty and whether probable cause exists to believe that the accused is guilty. *Id.* at § 3194. On these issues, a court's decision would be an appealable final judgment. Upon exhaustion of appeal from a finding of extraditablity, the Secretary of State would determine the applicability of the political offense exception and thereby fulfill the treaty obligations of the United States. *Id.* at § 3196.

The Senate Foreign Relations Committee failed to approve S.1639, citing the historical purpose of the political offense exception and the important role of judicial processes in ensuring fair and impartial consideration.

98. S.1940, 97th Cong., 2d Sess. (1982).

would specify particular types of conduct that could never be adjudged by a court to be a political offense.[99] The European Convention on the Suppression of Terrorism takes this approach.[100]

A middle level of constraint would have Congress set guidelines that would substantially narrow the relative political offense exception.[101] The guidelines would divide actions into *per se* exclusions from the political offense exception and actions that would qualify as political offenses only if committed under "extraordinary circumstances."[102]

Both of these approaches would make hijacking, for example, a *per se* exclusion. The distinction between the two would depend on how broadly or narrowly either Congress or the courts defined "extraordinary circumstances" and whether any meaningful distinction could be made under this rubric given the violent nature of so many political offenses. The most important criticism of these approaches is that they attempt to create automatic categories for actions taken in very different contexts with different motives and different consequences.

The least restrictive alternative involves placing the burden of production and the burden of persuasion on the person seeking to invoke the political offense exception in an extradition hearing.[103] This proposal has the merit of clarifying what is now a confusing situation with no consistent precedents in the case law. The proposal also seems to recognize that the person involved will have the best access to information linking him to a political struggle. However, the problem of distinguishing between a political offense and terrorism remains.

A final proposal would remove the issue from national competence and have all extradition requests decided by an international juristic tribunal such as the International Court of Justice. Proponents argue that an international tribunal could operate more objectively than a municipal

99. *Id.* at § 1396.

100. European Convention on the Suppression of Terrorism, *supra* note 93.

101. S.1940, *supra* note 98 incorporates this approach.

102. The bill would have required the individual seeking to invoke the political offense exception to demonstrate the existence of extraordinary circumstances by clear and convincing evidence. More is involved than a shift in the burden of proof. For while use of the term "extraordinary circumstances" appears to invite particularized justice, the Report of the Senate Foreign Relations Committee indicates that the term is much narrower than the traditional incidence test. "Extraordinary circumstances" refers only to situations where the accused had first attempted to exercise non-violent civil or political rights and was then forced to resort to violence as a means of self-defense. Though expansive judicial interpretation of the definition of an attempt to exercise civil or political rights and of forced resort to violence would be possible, the more likely result would be *per se* inapplicability of the political offense exception to any form of guerilla warfare.

103. Bassiouni, *Ideologically Motivated Offenses and the Political Offense Exception in Extradition — A Proposed Juridical Standard for an Unruly Problem*, 19 DE PAUL L. REV. 217 (1969).

tribunal. In addition, an international tribunal would be more concerned with balancing the interests of individual states against the standard of international equity and order than with the momentary interests of any one nation.[104] However, individual nations would retain the right to grant political asylum and thus the possibility of international friction would remain. Indeed, it is conceivable that a state's decision to grant asylum could spark even greater friction when it is taken despite the pronouncement of an international tribunal.

These proposals fail either to solve or to provide an alternative to the problem of defining a political offense in a way that distinguishes it from terrorism.

VII. Toward a Functional Test for the Existence of a Political Uprising

Cases will inevitably arise in which terrorism and rebellion cannot be distinguished except through clarification of the term "political uprising." The immediate task is to develop an analytical framework that facilitates this distinction and that reconciles the fundamental purpose of extradition, the return of criminal suspects to justice, with the purpose of the political offense exception, the preservation of neutrality in foreign relations. Toward this end, this article proposes adoption of a "functional test," consisting of a three-stage analysis, for determining the existence of a political uprising.[105]

104. For a discussion of the importance of this consideration in international decision making, see M. McDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 83 (1982).

105. The purpose of a functional test should be to distinguish between the two ubiquitous forms of modern political violence — "terrorism" and politically-based guerrilla warfare — so that the former falls outside and the latter within the political offense exception. Contrary to the admonition that one man's terrorist is another man's freedom fighter, it is possible to make the distinction in a functional rather than a normative manner.

See, e.g., M. STOL, THE POLITICS OF TERRORISM, chapter 4 (1979) for the argument that one characteristic of terrorism is that terrorist movements enjoy little popular support among the citizenry and control insufficient resources to win outright political or military victory. Terrorist movements attempt to undermine governmental authority through clandestine and sporadic operations against the social structure of a society. Terrorist tactics may be designed to demonstrate the government's inability to maintain order, discourage high visibility service in the government, provoke indiscriminate governmental repression in hopes of stimulating discontent, disrupt the economy, publicize a message, or otherwise create instability.

This is not to suggest that any movement that does not neatly fit the pattern of terrorism should necessarily be considered a rebellion or political uprising. Recognition of the essential characteristics of terrorism does, however, underscore the need to assess the relation between the proclaimed goals of a violent political movement and the claims made in the larger society.

Political Offense Exception

Stage I.

The first stage is familiar and directs inquiry into the offender's political objectives. The court should identify the cause for which the accused purports to have acted and determine whether he acted as a member of an organization seeking to advance that cause. The court should then appraise whether the movement is fundamentally incompatible with either the system of government within the requesting state (or with the leadership), and whether the movement seeks to seize political control of the state. Only claims to assume political control of the state or claims to self-determination should be considered adequate to support the finding that a political uprising exists.

Stage II.

The second stage asks whether a concordance or identity exists between the cause of a revolutionary organization and claims consistently asserted by larger societal elements. A "larger societal element" is an ethnically, religiously, demographically, economically, or culturally recognizable and cohesive interest group that is a significant participant in the shaping and sharing of values within the society. The relevant question at this stage is not how many but who asserts the claim.

Although the tendency of recent decisions is to place the burden of proof on the accused to establish the elements of the political offense exception, judicially discoverable and manageable standards exist to guide the courts in appraising the accused's efforts to identify these societal elements and to explain their claims. Evidence of a clear international consensus regarding the claims and representative status of parties to the conflict should be considered relevant when two conditions are satisfied: first, the consensus pertains not merely to an abstract norm but to the particular conflict at issue; and second, the consensus is expressed either in binding international law or by bodies, such as the United Nations General Assembly, that are highly representative of the world community.

In the absence of a clear international consensus, judges' impartiality in evaluating the evidence will be of paramount importance. The parties may offer evidence pertaining to cultural and historical antecedents of the conflict and to the level of cooperation between the revolutionary organization and the larger societal elements. The State Department's analysis might be represented *in camera* and political scientists and foreign correspondents can serve as expert witnesses.

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Stage III.

The third stage inquires whether the larger societal elements with whom the accused and his organization identify may reasonably be said to endorse or condone the use of force to achieve their goals. Such an inquiry is necessary because, even though larger societal elements may share the ultimate goal of a revolutionary organization, they may pursue alternative strategies, such as negotiation, for implementation. Inevitably, this inquiry must resort to circumstantial evidence and common sense. Several factors might be considered. First, the nature of the claim: is the claim so antithetical to the *status quo* that force is the most likely strategy? Second, the history of the conflict that the claim underlies: has there been movement and reconciliation, or is there a clear pattern of retrenchment and conflict? Has the government made political prisoners out of the revolutionary leadership? Third, the history of violence attending the political conflict: has the governmental response to the assertion of the claim been violent? Have nonviolent activities such as strikes or demonstrations been permitted? Has there been a discernible escalation in the level of violence? Have other independent paramilitary groups sprung up?

There is unavoidable difficulty in answering these questions. Ultimately, the functional test is an analytical framework rather than a set of rigid rules. It offers an approach for thinking about the issues raised in determining the existence of a political uprising and for resolving these issues in a manner consistent with the policies behind international extradition. The approach is useful to the extent that it facilitates organization and comprehension of the facts of a particular conflict. However, it must be emphasized that the functional test is not the end of the political offense inquiry. Even assuming the existence of a political uprising, the Swiss test for determining whether a violent act was necessary or proportional to the goals of a revolutionary movement must be applied. Finally, courts should recognize that, in extraordinary cases, any formulation of the political offense exception must defer to compelling foreign policy concerns.

Conclusion

This article has argued that the political offense exception is not an outdated relic of a simpler age. Neutrality in foreign rebellions, to the extent of refusing to deliver belligerents into the hands of their enemies, remains sound policy in the contemporary world community. The political offense exception does not require a determination of which party in a political controversy is more just; rather, it preserves the integrity of

international extradition as a mechanism to bring common criminals to justice. Judicial involvement inhibits political manipulation of the mechanism and affords a measure of procedural fairness to the accused. This involvement has had no discernable adverse effect on the conduct of United States foreign policy. Therefore, the difficulty in dealing with modern political violence does not call for sweeping change, but can be solved through development of the existing jurisprudential approach.

The functional approach recognizes the necessity of refining the political uprising component of the incidence test. There is no other way to distinguish rebellion from terrorism. The functional test suggested here would require an examination of the goals of a revolutionary organization and of the place of those goals within the larger society. Such an exercise is not normative, but functional, and does not imply approval or disapproval.

In the final analysis, adoption of a functional test will depend on the ability of the courts to develop the analytical framework to assess realistically the concordance between the goals of a revolutionary movement and the claims asserted in the larger society. This is no simple task since the assessment must adhere to evidentiary norms. The framework suggested in this article may provide a useful starting place, but the actual development awaits courageous and innovative representation by practitioners and similarly creative balancing of considerations by judges.

UK-US SUPPLEMENTARY EXTRADITION TREATY AND THE EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM

There have been a number of references during the Senate Foreign Relations Committee's hearings on the UK-US Supplementary Extradition Treaty to the 1977 European Convention on the Suppression of Terrorism (ECST).

Proponents of the treaty have argued that the treaty follows the Convention in limiting significantly the political offence exception to extradition in respect of serious crimes of violence. Nineteen Western European countries have now signed the Convention. Ten (Austria, Denmark, the Federal Republic of Germany, Greece, Luxembourg, Turkey, Spain, Leichtenstein, Belgium and the United Kingdom) have accepted the Convention without reservation. Eight (Cyprus, Iceland, Italy, the Netherlands, Norway, Sweden, Switzerland and Portugal) have entered reservations under Article 13. France has also entered a reservation, but of a rather different character. It is, however, not clear whether those countries which have entered reservations would in practice treat fugitives wanted for serious crimes of terrorist violence differently from those countries which have joined the Convention without reservation. Indeed, even those states which have entered reservations under Article 13 are obliged, in exercising such a reservation, to take into due consideration such questions as whether the offence created a "collective danger to the life, physical integrity or liberty of persons", whether it affected "persons foreign to the motives behind it" and whether "cruel or vicious means" were used in its commission. These are significant limitations on the way in which Article 13 reservations may be exercised.

Recent practice in countries which have entered reservations bears this out. For example, the Swedish courts appear to draw a distinction between political offences of an "absolute" character, such as sedition and espionage, and other offences involving non-political crime, eg murder or armed robbery, where nevertheless a political motive might be alleged. The first category of offences are not normally extraditable in Sweden, but in recent years the Swedish courts have ordered the extradition of fugitives wanted for crimes of violence in the second category. One example is the extradition of an Italian wanted on a charge of attempted arson whose aim was the overthrow of the established political order in Italy. Extradition was, however, denied on other charges relating to the organisation and recruitment of members of a league to accomplish these ends. In another case the Swedish courts decided that a person accused of the attempted murder of a senior Government official of a third country should be extradited to the United States even though the fugitive argued that he was politically motivated. In Iceland a new law was enacted in 1984 allowing extradition for political offences in cases where criminal acts are involved and the political aspect is a relatively minor factor. There are no recent cases where the political offence exception has been raised. Despite Norway's reservation under Article 13, there would be no difficulty over extradition for serious crimes of violence to countries where the fugitive would be treated fairly. And France has, despite its reservation, extradited Basque terrorists wanted for serious crimes of violence by Spain.

It should also be noted that reservations under Article 13 apply only to extradition. But the Convention provides both for extradition and for the establishment of extraterritorial jurisdiction. In many of the countries which have signed the Convention the prosecution of extra-territorial offences is a feasible option and, even if a request for extradition was declined on political grounds, the fugitive would not necessarily escape justice. This is in contrast to the US-UK Treaty which is confined to extradition. Rejection of an extradition request under the treaty means that the fugitive evades justice altogether.

It has been suggested that the coverage of the UK-US Supplementary Treaty is broader than the European Convention. The list of offences in Article 1 of the treaty is more specific than that in Articles 1 and 2 of the Convention, but the treaty covers the same ground as the Convention and enshrines precisely the same basic principles. The Supplementary Treaty defines closely the serious crimes of terrorist violence to which it is proposed the political offence exception should no longer apply: this degree of specificity is normal in a treaty, and mirrors the categories of offences listed in the Convention. Article 5 of the ECST contains what is called a "humanitarian safeguard", allowing the requested state to decline to extradite if it has substantial grounds for believing that the extradition request was made in order to prosecute or punish the fugitive on account of his race, religion, nationality or political opinion. Although this provision was appropriate in a multi-lateral instrument such as the Convention, the British and US Governments did not and do not believe that it is appropriate or necessary to a bilateral treaty between the United Kingdom and the United States. The Supplementary Treaty is posited on the fact that in neither country is it possible for a person to be tried other than for alleged criminal conduct. The question of prosecutions or punishments for religious or political reasons does not therefore arise.

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Senator HATCH. Our first panel consists of Mr. Stephen Trott, Assistant Attorney General of the United States in charge of the Criminal Division of the Department of Justice, graduate of Wesleyan University, having received his juris doctorate from Harvard Law School.

He has held the posts of deputy district attorney for the city and county of Los Angeles, chief deputy district attorney, and from 1981 to 1983 was the U.S. attorney for the Los Angeles district.

He has been an Assistant Attorney General since 1983.

I am happy to welcome you to the committee, Mr. Trott.

Mr. TROTT. Good morning, sir.

Senator HATCH. I would like to also call upon Abraham Sofaer, who is currently the Legal Advisor of the U.S. Department of State. Judge Sofaer was formerly a professor of law at Columbia University; law clerk to Hon. William J. Brennan, Jr.; assistant U.S. attorney; and a U.S. district judge. As a distinguished judge and prominent scholar, he has published a major study of the Constitution and the Presidental war power.

We are happy to have both of you with us today, and we will begin with you, Mr. Trott.

The CHAIRMAN. Mr. Chairman, I——

Senator HATCH. Oh, excuse me, I am sorry. Mr. Chairman we will turn to you for any comments that you wish to make.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

The CHAIRMAN. I will not be able to stay for the entire hearing, I have another commitment that I have got to fulfill. But I think this is a very important matter. Mr. Terrell Lee Arnold has written an article, which appeared in the Washington Post on October 23, 1985, and I just want to quote from an excerpt here:

> The political offense exception means that if another country requests extradition of a fugitive for a crime, and if a United States' court finds that the crime was political in nature, extradition will not be allowed.
>
> After the courts found that they had, in fact, committed the crimes charged against them, IRA members have made broad use of this political defense, in several cases, to avoid extradition to face prosecution.

And he mentions specific cases and I think this is significant: *Mackin,* accused of killing a British soldier on patrol in Belfast, in March 1979, extradition refused by a New York court.

Next, *McMullen,* accused of bombing a British army barracks; extradition refused by a California court.

Next, *Doherty,* accused of killing a British soldier as well as taking hostage and beating a civilian prison guard; extradition refused by a New York court.

Quinn, accused of a wave of bombings in London; lower court finding for extradition overturned by a U.S. district court.

Now, Mr. Chairman, it seems to me that steps must be taken to provide that terrorists who go out and kill people and commit crimes not be allowed to get away with it on the ground that it is political. Whether it is political or not, is not the question. Is it a crime? Is it wrong? Is it against the law? And if so, they ought to be extradited.

And I wanted to bring that point out and make my position well known on it.

Senator HATCH. I think that is a fair point, Mr. Chairman.

Senator DeConcini.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, I am pleased that this committee is holding some hearings. I am very interested in the problem of Northern Ireland. I suppose that a little bit of knowledge may be dangerous as they say, but having visited there, and visited a number of students of this area, I find it very disturbing. I had the pleasure of going there very recently and although, the official topic of this hearing is the Supplemental Extradition Treaty with Great Britain, the broader question of the situation in Northern Ireland, cannot and should not be ignored.

In fact, if anything useful is accomplished by the treaty before us today, it is that it provides a means for drawing the Senate's attention to the struggle of the people in Northern Ireland, and the unfortunate role of our Nation's closest allies has become locked into that struggle. The most significant effect on the supplemental treaty would be to amend article V, section 1(c)(i) of the existing treaty so drastically as to render this provision commonly referred to as the political defense exception provision, a nullity.

Great concern has been expressed both in the Senate Foreign Relations Committee and the Senate Judiciary Committee over proposed legislative provisions that remove from the Judiciary and bestow upon the executive the right to decide whether offenses were of a political character. While the supplemental treaty does not completely remove from the courts the right to decide whether offenses are of a political character, it does define which offenses the court cannot find to be political.

That list, set forth in article I, is so sweeping that under the supplemental treaty, courts will, as a practical matter, be left with nothing to decide.

They will be compelled under the statutory procedure to enter orders of extradition in all such political defense cases and to certify them to the Secretary of State. It will then be for the executive alone to decide whether extradition should be forwarded. The supplemental treaty makes a second significant change in existing law by amending article V, section A(b) of the existing treaty which bars extradition if prosecution for the offense for which extradition is requested, is barred by the statute of limitation of the requesting, or requested party.

Under article II, of the supplemental treaty, the statute of limitation of the requested party will no longer be considered.

The administration tells us that this treaty was negotiated in order to improve law enforcement cooperation and counter international terrorism and other crimes of violence.

There is no doubt that we all abhor terrorism. But we must carefully scrutinize what kind of a response that we make in the cause of preventing terrorism, especially when the traditional role of our country as a place of asylum for political dissenters is affected.

Regrettably, all too often in our country the attention that is given to national or international tragedies give rise to political solutions that cause more trouble than they solve.

With this fact in mind, we must ensure that the treaties that we enter into to combat international terrorism do not become political pretexts or maneuvers with which we disagree.

I am not convinced that we need to supplement to the extradition treaty which we already have with Great Britain. What is the evidence that the existing treaty has not worked? It is my understanding that out of the 56 closed cases involving requests by Britain for extradition, in only 4 has extradition been denied. Having been on the Senate Judiciary Committee for almost 9 years and having been the chairman of the Subcommittee on the Courts for 4 years, I have considerable faith in both the judges in this country and in our system of checks and balances which allows the American judicial system to play a real role in matters of this sort and not merely be the rubber stamp for administration foreign policy decisions.

The Senate Foreign Relations Committee and the Senate Judiciary Committee have considered amendments to extradition law at least three times in the last two Congresses. Both Committees agreed that the courts should be allowed to determine the sufficiency of the political defense claim. Yet, this supplemental treaty would be a reversal of these committee decisions. If U.S. extradition law needs to be reviewed, as a member of the Senate Judiciary Committee, I would be happy to participate in such a review. However, the ongoing struggle in Northern Ireland will not be solved by a new extradition treaty or by a revision of U.S. extradition law. An end to this struggle will come only through new political solutions. Before we consider making this major change in our extradition law, it is my view that major changes should at least be begun in all facets of life in Northern Ireland, perhaps beginning with the court system structures of that nation. If such changes were seriously undertaken by the British, and if a timetable were set and followed for implementing these changes, then I firmly believe that British would no longer call upon us to change our extradition laws.

Senator HATCH. Senator Grassley.

Senator GRASSLEY. Senator, I am going to submit a short statement for the record.

Senator HATCH. Without objection, we will place it in the record at this point.

[Statement follows:]

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Mr. Chairman,

I want to commend you for holding today's hearing on the Supplementary Extradition Treaty between the United States and the United Kingdom.

This supplementary treaty is an attempt by the President to deal with Irish Republican Army terrorists who have fled to the United States and who seek to avoid extradition by claiming their acts were political, and therefore, included under the political offense doctrine, which disallows extradition.

Under the Supplementary Treaty, the executive branch has taken the definition of a political offense out of the hands of the judicial branch by specifically determining what is not a political offense.

We all agree that terrorism is a heinous crime that must be dealt with effectively. However, I am not convinced that partially excluding the judiciary from extradition cases will be an effective method in dealing with terrorism.

The courts constitutionally have the jurisdiction to determine questions of human liberty. Consequently, a looming separation of powers issue exists and must be thoroughly examined before the Senate makes any decisive determination on this issue.

I therefore look forward to hearing today's distinguished witnesses, and hope that answers to these questions will result.

Thank you Mr. Chairman.

STATEMENT OF A PANEL CONSISTING OF STEPHEN TROTT, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, DC; AND ABRAHAM D. SOFAER, LEGAL ADVISOR, DEPARTMENT OF STATE, WASHINGTON, DC

Mr. TROTT. Thank you Senator, if my entire statement could be received in the record?

Senator HATCH. Without objection we will place all entire statements of every witness who comes before the committee this morning, in the record, as though fully delivered.

Mr. TROTT. Senator Hatch, thank you for the opportunity to appear before you today, on what I consider to be one of the most important principles with which we must grapple in this century.

It is absolutely clear, without a doubt, that crime now, and crime in the future must be regarded and I include terrorism in this category, as not a local or a national problem, but as an international problem.

Terrorism and crime, in general, have assumed dimensions in every respect that are international in character. The most pernicious and dangerous of criminals that we confront today, operate way beyond the reach of the traditional cop on the beat and the basic legal system that we rely on, that the civilized world relies upon to protect us from violence and indiscriminate attacks in crime.

And unless we view crime in this way, I think that we become nothing more than a sitting duck target for people who will abuse the instincts of civilized people to treat each other in a civilized way.

I first confronted the political offense exception when I was the U.S. attorney in Los Angeles and I think that it is important to view this as if these were our people who were on the receiving end of bullets and bombs and not just other people in another location.

A group of terrorists plotted to blow up the Los Angeles International Airport. They were receiving directions from Beruit to do this. Fortunately, the FBI was listening to all of the instructions coming from Lebanon, and they were able to identify this terrorist group and they arrested most of them as they were placing fire bombs at Air Canada at Los Angeles International Airport.

One of them escaped—a man named Tchakhutian, who made his way to France. We tried to extradite him, from France, for trying to blow up the Los Angeles International Airport and our attempt to extradite him to the United States was turned down on the grounds that that attempted fire bombing was a political offense.

And I ask a question that is not rhetorical—would we, for 5 minutes, in the legal system of this country ever let a single person charged with a crime off, because he said, oh, this is a political murder?

What would we have said to Sirhan Sirhan, if he had showed up in court after assassinating Robert Kennedy and said, oh, I should be freed from this because this was a political offense?

What would we have said to Lee Harvey Oswald if he said, I killed John Kennedy, the President of the United States, because it was a political offense? And what would we say to the fire bombers and other people, who periodically rage around this Nation bombing people claiming that they are doing so, because they are oppressed by the American Government if they try to say, this is a political offense and we should get off?

And do we, for 5 minutes, find it within ourselves, to say to the British, with respect to people who are murdering their soldiers, bombing within that country and committing terrorists acts, that we will become a safe haven for the people who maraud in that territory committing those kinds of acts?

Where it is and what is going on, in a sense, is irrelevant in one dimension. This is not political nonsense. This cannot be viewed as politics, this must be viewed as crime and all friendly nations, especially those who have democratic systems, must join together and stand shoulder to shoulder in a worldwide network against terrorism.

We cannot afford to become safe havens for other people's criminals.

One of the things that we tried to do, and I think, successfully in the TWA hijacking, which would be a claimed political offense, or the bombings of our Embassy or the murders of our Marines, which would be claimed to be political offenses, was to identify this as criminal activity.

These people are not political freedom fighters, they are criminals. And the reason why that is important, is because we must bring to bear as civilized nations the rule of law against this type of activity. And in order to do that, we have got to get out of our own skins and I am talking about all countries and be willing to stand up against this and not provide opportunities in one country to flee to another.

I firmly believe that the political offense exception has a place in the law of extradition. Its place should be limited to crimes of advocacy, not crimes of bombing, or murder, of shooting, of killing people. It is clear that in a place where there is a way to address grievances, to go to court, to participate in elections, to get things done, that there ought to be no room for this kind of crime. And that is why we believe that especially with our great friend, across the sea, to which this applies, that limiting the political offense exception as we have done in this treaty makes a lot of sense.

The list of crimes that is in article I of the protocol, is a list of conduct that in all civilized nations is regarded as criminal.

Now, there has been a question as to whether or not we simply gut the judicial process by doing this. And Mr. Chairman, I think that is a valid concern, but it simply is not the case. The extradition process is still a very complex process. And will be available to

anybody in the United States under this treaty who is sought to be extradited by Great Britain.

Right now, it takes up to as long as 1 year or 1½ years, in the court system alone to process an extradition.

And I would suggest that that process is full of protections for individuals that were involved and it will not be shortened or forestalled by this protocol.

In effect, the supplemental treaty does not alter these procedures or protections one bit. It simply says, in the area of the political offense, we are going to require that they apply only to political offenses.

And we are uniting with our ally to say that we are not going to permit murder and manslaughter and bombing and kidnaping and airplane hijacking and all the rest of those heinous offenses against humanity to be regarded as political offenses. No more than we would in the United States, if somebody tried to claim that as a reason to escape justice for what that person did.

I believe that it is well within the power of the executive branch and Congress and the court system in the United States to do exactly what we are doing here, and I think that it makes sense to do it with Great Britain first. There has been a great question raised as to whether we should not treat all countries equally and I think, no.

We should take one country at a time and we should examine carefully the extent to which we see that country as providing a way to redress grievances through the civilized democratic process. And to the extent to which we see a court system to provide a fair trial, when a person is returned via an extradition.

I know that I am probably going to exceed my time, and I think that it is probably more productive for you to question both myself and Judge Sofaer, but let me simply say that on the part of the Department of Justice, at the risk of repeating myself, countries must stand together against terrorism. We must not see this, when it comes in the context of hijackings and murders, as politics, but as crime. Otherwise, we are sitting duck targets for this type of activity.

The whole Klinghoffer affair, which everybody knows, is another situation. How embarrassed were we when we were attempting to talk our allies into returning the people responsible for the murder of Mr. Klinghoffer, and we were told "No, no, no," and now Mr. Abbas is out there in the wind some place. What a tremendous effect it might have had against terrorism if we had been told, "yes" if the response had been otherwise and we had received back in the United States to stand trial, the apparent mastermind of that event.

That is what is on line here—it is whether or not civilized countries will work together against this or whether we are going to all stand apart and remain the problem rather than part of the solution.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Mr. Trott.

[The statement follows:]

Prepared Statement of Stephen S. Trott

Mr. Chairman and Members of the Committee, the Department of Justice is grateful for having been given the opportunity to participate in today's hearings on the Supplementary Extradition Treaty between the United States and the United Kingdom. It might be useful at the outset to address some of the concerns regarding the Supplementary Treaty that have been raised since Senate hearings on its ratification began three months ago.

First of all, the Supplementary Treaty does not abolish the political offense exception. Rather, within the confines of extradition relations between the United States and the United Kingdom, it would remove from the purview of the political offense exception certain crimes that are terroristic in nature.

The extradition treaty currently in force between the United States and the United Kingdom bars the extradition of persons whose crimes are deemed to be political offenses. While that term has defied comprehensive definition, "American courts have uniformly construed 'political offenses' to mean those that are incidental to severe distrubances such as war, revolution, and rebellion." Sindona v. Grant, 619 F. 2d 167, 173 (2d Cir. 1980). This definition comes from a test first adopted by the British courts in Re Castioni, [1891] Q.B. 149 and has been the litmus test in United States extradition jurisprudence since 1894. In Re Ezeta, 62 F. 972, 977-1002 (N.D. Cal. 1894). See also, Ziyad Abu Eain v. Wilkes, 641 F. 2d 504 (7th Cir. 1981); Gaspar Escobedo v. Forscht, 623 F. 2d 1098 (5th Cir. 1980); Garcia Guillern v. United States, 450 F. 2d 1189, 1192 (5th Cir. 1971), cert. denied 405 U.S. 989 (1972).

In recent years there have been four cases involving requests by the United Kingdom for the extradition of Provisional Irish Republican Army (PIRA) members charged or convicted of terroristic crimes. In each case the fugitive claimed that the

unsettled social situation in Northern Ireland constitutes a "war, revolution, [or] rebellion," and that his offenses therefore, qualify as "political offenses." In what can only be viewed as a departure from established case law concerning political offenses, United States courts have accepted this argument in all four cases. Two of the cases are presently being appealed.

In each of the four cases the courts have concluded that there is a "war, revolution, [or] rebellion" in progress in Northern Ireland and that any PIRA member who commits crimes of violence in the United Kingdom must be acting in furtherance of that "war, revolution, [or] rebellion." This logic is specious. It fails to take into account that much of the turmoil in Northern Ireland is actually fomented by the PIRA and their Loyalist couterparts, and that the vast majority of Northern Ireland's population does not approve of or participate in the wanton violence used by both the left and right wing terrorists in that country. Furthermore, the citizens of Northern Ireland may vote, and otherwise have access to the political system; hardly attributes that one would normally associate with a country experiencing internal "war, revolution, [or] rebellion."

The Supplementary Treaty would reduce any further aberrations in American jurisprudence regarding the political offense exception. It would also prevent terrorists who committed heinous crimes against the citizens and laws of the United States or the United Kingdom from finding a safe haven in either country. Thus, for example, if the murderers of Lord Mountbatten and the two youths who were blown up with him were ever to travel to or through the United States, the government of the United Kingdom could request their extradition and know that the fugitives could not avoid extradition merely by claiming that their offenses were political in character.

It should be noted that to be successful in such a request, the British would still be required to submit formal

documents in support thereof and a United States magistrate or judge sitting as an extradition magistrate, would still be required to find the following: (1) that an extradition treaty is in force and effect between the United States and the United Kingdom; (2) that the offenses for which extradition is sought come within its purview and are criminal in both countries; (3) probable cause to believe that the crimes were committed by the persons sought; and (4) that the persons sought were the persons appearing before the court.

If a court should find the evidence submitted on behalf of the United Kingdom insufficient on any of the above points, the extradition request would fail. At present, the only remedy available to the British government in that case would be to refile its request for extradition.

If a court in our hypothetical, were to find the fugitives extraditable, they could seek review of that decision by filing petitions for writs of habeas corpus. If the petitions were granted, the government could then appeal. If the petitions were denied, the fugitives could appeal and thereafter exhaust their judicial remedies up to and including the Supreme Court of the United States. Even then, if their extraditions were upheld by the Supreme Court, the Secretary of State could still deny extradition if he were to find that the extradition request had been politically motivated.

Thus, several matters should be clear. The Supplementary Treaty will not change the extradition process in the United States from the way it currently operates. Federal courts will continue to exercise the sound discretion conferred upon them by Article III, §2 of the United States Constitution to interpret and apply extradition treaties, which, like federally promulgated laws, are a part of the supreme law of the land. United States Constitution, Article VI, §2.

Though primarily a matter of judicial interpretation, extradition may also be viewed as a political matter to the

extent that it involves each branch of the federal government. Article II, §2 of the United States Constitution confers upon the President the authority to enter into treaties, "by and with the [a]dvice and [c]onsent of (two-thirds of) of the Senate." Furthermore, Congress, pursuant to its general law making authority, may enact legislation concerning extradition as it has done in Title 18, United States Code, Section 3181, et seq. Precisely because extradition is to some degree a political matter, it may have inadvertently escaped the attention of some, that the United States has reached a fork in the road in matters concerning extradition and international terrorism.

We may enter into treaties such as the one under consideration, consistent with the demands we make upon other nations for the mutual extradition of terrorists. Or, we may cry out against terrorism committed against American citizens abroad and turn a deaf ear to the pleas of other nations to return to their justice terrorists who have broken their laws and the laws of nations.

Our decision will not go unnoticed by other nations or by would-be terrorists inside or outside the United States.

STATEMENT OF ABRAHAM D. SOFAER

Judge SOFAER. Mr. Chairman, I think that the *Abbas* case is a good place to start. I think that Americans would be shocked if they knew and they will know, of course, gradually, and if this extradition treaty is turned down, they will certainly know it, that this country refuses to extradite, has refused to extradite four people who are guilty of the kinds of crimes, kinds of activities that Abu el Abbas and other terrorists in the world were guilty of.

The kinds of crimes that the PIRA fugitives that have not been extradited committed, were recited by Senator Thurmond, and I would recommend, Mr. Chairman, that that article from the Washington Post which is written by a former State Department official be included in the record. It is an excellent Op Ed piece.

Senator HATCH. Without objection, we will put it in the record, at this point.

Judge SOFAER. Thank you.

[Information follows:]

[From the Washington Post, Oct. 23, 1985]

IS THE U.S. BECOMING A TERRORIST HAVEN?

By Terrell E. Arnold

A vigorous mail-in battle is raging around current Senate consideration of a proposed change in the U.S. extradition treaty with Great Britain. Opposition lobbying, particularly of the New York and Massachusetts congressional delegations by traditional supporters of the IRA, is aimed at preventing any change of the political offense exception in U.S. extradition law by blocking Senate approval of the treaty.

The political offense exception means that if another country requests extradition of a fugitive for a crime, and if a U.S. court finds that the crime was "political" in nature, extradition will not be allowed. After courts found that they had in fact committed the crimes charged against them, IRA members have made broad use of this "political" defense in several cases to avoid extradition to face prosecution: (a) Mackin, accused of killing a British soldier on patrol in Belfast in March 1979—extradition refused by a New York Court; (b) McMullen, accused of bombing a British army barracks—extradition refused by a California court; (c) Doherty, accused of killing a British soldier as well as taking hostage and beating a civilian prison guard—extradition refused by a New York court; (d) Quinn, accused of a wave of bombings in London—lower court finding for extradition overturned by a U.S. District Court.

The spread of international terrorism, involving frequent travel of terrorists to commit violent acts abroad or to escape the consequences of violent acts at home, requires us to reexamine the intent of the political offense exception, because the language of our law can be used and is on occasion being used as a safe haven for terrorists. Current court interpretations of this language also are frustrating U.S. efforts to gain the cooperation of other governments in closing legal loopholes that help terrorists.

The political offense exception was designed, as I understand it, to protect the individual from persecution or harassment by a foreign government for acts done in furtherance of political views. I can find no evidence in the record, however, that Congress or the people intended this exception to be used to help the individual escape prosecution for violent crimes; to encourage the individual in the use of violence as a political instrument; or to suggest to any one that policemen, innocent bystanders, servicemen or even the clergy are fair game so long as the reason for taking a shot at them is political.

Yet, current interpretations for the political offense exception by the courts and by defense attorneys are conveying all three messages. The purport of the findings in both New York cases is that attacks on military personnel, no matter what those personnel may be doing at the time, are political acts to be protected under the exception. The argument of the court in the Quinn case appears to go so far as to assert that any violent act conducted in the context of an uprising against existing authority should be covered by the exception.

In an age of growing resort to terrorist violence as a bargaining tool, those assumptions are dangerous. If we permit the findings in these cases to prevail, any attack by the Red Army Faction, or the Red Brigades, or Action Directe or other groups in Europe against NATO facilities would be legitimated. Given that the court in the Quinn case essentially rejected the so-called "wanton crimes" exclusion from the political offense exception, crimes such as the IRA bombing of Harrods department store during Christmas 1983 or the suspected sabotage of an Air India flight out of Canada a few weeks ago would not be extraditable offenses. If U.S. extradition laws were in force in Germany, the Red Army Faction terrorists who killed a U.S. airman merely to get his ID card could avoid extradition. If Lebanese extradition laws were like ours, the Hezbollah terrorists who hijacked TWA flight 847, and even now are holding Americans hostage, could easily escape extradition for their crimes. With the safe haven of an extradition law such as ours, a future Oswald or Sirhan Sirhan could kill a national figure, flee the country and forever escape prosecution for the crime.

We can stop the glaring abuses of our extradition law by terrorists, and maintain the intended freedom of political expression and association, by excluding violent crimes from coverage by the political offense exception as proposed in the new treaty with Britain. That charge should make it impossible for terrorists to carry out assassinations, murders, kidnapings and other terrorist acts and then escape the consequences by claiming a political motive.

As part of any national strategy to combat terrorism or to enlist the cooperation of other nations, it is essential that we put our own house in order by closing down this legal haven for terrorists. By rejecting this treaty, the Senate would deliver a major boost to international terrorists and a major setback to our country's efforts to combat terrorism.

Judge SOFAER. I will not spend a great deal of time talking about those particular crimes. I have a description of the kinds of things Quinn did, at quite some length, in my testimony. It was held that his bombing activities and his killing of a police officer, were political. These decisions, are relatively recent. The political offense exception has worked fairly well in the United States. We have made a judicial process out of our extradition system, and it will remain so. We always extradite people through the extradition process.

Recently, perhaps because of the sensitivity in this country toward the Irish cause—a sensitivity which we all feel, Mr. Chairman—some courts have come down with very expansive interpretations of the political offense exception.

We are seeking to change that interpretation at least in so far as it affects our democratic allies. And we have started that process, I think, rightly so, with our first extradition partner—the closest ally that we have in the world, the United Kingdom.

Now, this is the right approach, to take it nation by nation. We are not seeking to negotiate treaties of this kind with nations that do not have democratic systems and that do not have fundamentally fair judicial systems.

What we are saying here, as Mr. Trott has indicated, is that with respect to those sorts of nations, where you have the option of the ballot box, you cannot resort to the bullet and the bomb.

Now, critics of the treaty have said that this is not a real serious problem, it is only four cases. I point out to you, Mr. Chairman, these four are recent cases and this is a principle that has been established and will be picked up by other courts and applied to other kinds of terrorists. There is no principled basis upon which to distinguish the IRA terrorist from the terrorists of all other types that will take sanctuary in this country if this principle is established and remains a part of our extradition system.

Nor is this effort on our part anti-Irish. There is nothing that could be said in that connection that could be true. We are seeking this limitation on the political offense exception with respect to any terrorist activity, that might occur in the United Kingdom, and of course, we would benefit from it, because any terrorist activity that occurred here, of the kinds listed in the schedule of covered offenses, we could extradite those people from England to stand trial in this country.

Now, I am going to skip through most of my testimony, as you recommended, Mr. Chairman, and I note for you that I have testified extensively on this subject in the Senate, with the Foreign Relations Committee, and I would like to make my testimony there a part of the record here as well.

Senator HATCH. Without objection, we will make that a part of the record as well.

Judge SOFAER. That goes into the history of this political offense exception, which really is quite interesting, and will put into perspective what we have done here. Now, Senator DeConcini said that this treaty will make a nullity of the political offense exception.

It is absolutely untrue. The political offense exception historically was designed to protect people who were engaged in political types of activities. We had laws in the United Kingdom and elsewhere against seditious libel, against espionage, against various kinds of activities that the sovereign might deem to be criminal but, which we, in a democratic republican regime, would deem to be political.

These are the roots of the doctrine. Now, it did get expanded, and at a very important time in history, with implication for what we should be doing now. In countries that were nondemocratic, people would revolt during the 19th century and late 18th century, and the democratic regimes, including the United States, looked with some sympathy on people who were fighting against monarchies and other places where there was oppression.

So the offense exception was broadened to cover even some violent activities that were closely related to those kinds of revolts.

But that is not what is at stake now. What we are talking about now are people who are trying to assert their opinions in democratic regimes where the political system is not closed to them—where actually ongoing negotiations are underway, in this particular instance, to resolve political difficulties—and are using the bomb and various criminal activity to have their way.

So, the political offense exception will remain in place. It will remain in place in its entirety with respect to all of those nations with whom we do not negotiate these kinds of treaties, and it will remain in place for all of those offenses, other than the terrorist type offenses that we have listed in the treaty.

And most of those offenses, if you look at them, Mr. Chairman, you will see they are the kinds of things that terrorists do. And that is why those offenses are listed there.

What we have done is quite similar to the European Convention, signed in 1977, and I have done a study of that, and I would like to include that in the record as well.

Senator HATCH. Without objection, it will be done.

Judge SOFAER. That study shows how similar that Convention is with the treaty we have negotiated. Indeed, the treaty that we have negotiated has precedence even in the treaties that we have with other countries.

It is, in principle, just like the treaty that we have with Canada, and the treaty that we have with the Federal Republic of Germany. Both of those treaties, make exceptions to the political offense exception. And our treaty, the one with the United Kingdom, goes further than those because we have learned more. We have learned that there is a necessity to go further and we will be negotiating additional treaties with our democratic allies to take care of this problem in other countries.

I would like to just spend a moment on the retroactivity problem, Mr. Chairman, since you raised it. There is no violation of the ex post facto clause of the Constitution here.

The Supreme Court has held that an ex post facto law is any law which imposes a punishment for an act which was not punishable at the time that it was committed. Or imposes additional punishment to that then described. Article IV does not offend this clause because the supplementary treaty applies only to acts that were offenses in both countries at the time they were committed.

The fact is that all of our treaties apply retroactively in the sense that this treaty does. It does not make criminal anything that was not criminal before, but it covers acts that were criminal when they were undertaken.

Consequently the ex post facto clause is simply inapplicable. It has been so held by the seventh circuit. The second circuit has gone even further and said that it is the normal rule in treaties that they apply retroactively, in an opinion by Judge Friendly and if this ever becomes an issue, I would be happy to supply that opinion to the committee.

I would like to end and take your questions because I would like to know what your concerns are. But I want to spend just a few minutes raising, as I say here, a question of my own, Mr. Chairman.

Is this supplementary treaty really flawed or are the increasingly technical questions and objections being raised about it the product of vocal support of some in this country for the Irish Republican cause?

I frankly doubt that objections of this kind would be raised if the treaty were seen as affecting Libyan, PLO, FALN, or Black Liberation Army terrorists. This committee and each Member of the Senate, must eventually come to grips with fact that however sympathetic he or she may find some of the IRS's ends, the means they have adopted are impermissible as well as counterproductive.

And we cannot have our favorite terrorists. All who use bombs where they can use the ballot, must be condemned. That, in fact, is what every leading Irish politician in America has said. As the friends of Ireland, including 45 Members of the Senate, including you, Mr. Chairman, including Senator DeConcini, Mr. Chairman, said in their 1984 St. Patrick's Day statement, "We unreservedly condemn the acts of violence on both sides. We renew our urgent appeal to all Americans to renounce the path of the bomb and the

bullet and to reject the pleas of those who seek, by word or deed or dollar to promote or condone the cause of violence."

This treaty, Mr. Chairman, would apply to a protestant who committed a violent act in the United Kingdom as well as to a Catholic. It would apply to an Arab as well as to a Jew. It applies to all terrorist acts committed in the United Kingdom and in the United States.

Thank you.

Senator HATCH. Thank you, Judge.

[Statement follows:]

Prepared Statement of Abraham D. Sofaer

Mr. Chairman and Members of the Subcommittee:

I am honored by your invitation to testify on the Constitutional aspects of the Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States and the Government of the United Kingdom. This Treaty was signed on June 25 and transmitted to the Senate on July 17.

Mr. Chairman, the subject of extradition received widespread public attention recently in the aftermath of the Achille Lauro hijacking. The United States Government sought to utilize its bilateral extradition treaties with Italy and Yugoslavia to obtain the provisional arrest of the hijackers' commander, Palestinian terrorist Abu el Abbas. These efforts were unavailing, and Abu el Abbas escaped being brought to justice. The American people were rightly outraged by this failure of the international extradition process.

Most Americans would be shocked to learn that, in several instances, our own nation has refused to extradite terrorist fugitives to our democratic allies. In the last few years, four members of the Provisional Irish Republican Army (the "PIRA") have fled to the United States to avoid prosecution or punishment for such heinous crimes as murder and bombing. The United Kingdom requested the extradition of these fugitives, but federal courts denied the extradition requests, on the ground that these terrorists had committed "political" offenses that were exempt from extradition.

What kinds of crimes had these PIRA fugitives committed? Let me give you one example, William Quinn. Quinn was accused of committing a variety of crimes in 1975, including participating in the placement of bombs in public places (such as a railway station, a pub, and a restaurant) and mailing various letter bombs (to a Roman Catholic Bishop, a judge, and

a London newspaper). These bombs caused great damage. For example, when the judge opened one package, the bomb exploded in his face. Another package was opened by a guard at the newspaper, and his left hand was blown away. Quinn was eventually stopped by a policeman in London for questioning about a burglary. Quinn fled, and another policeman tried to arrest him. Quinn shot the policeman three times and killed him.

Quinn fled to the United States, where he was arrested in San Francisco in 1981. The United Kingdom sought his extradition to stand trial for the murder and bombings. The evidence of his guilt was overwhelming (for example, his fingerprints were on the bombs, and the gun that killed the policeman was in his apartment). Nevertheless, in 1983 a U.S. federal judge barred Quinn's extradition to stand trial in the United Kingdom, ruling that a "political uprising" existed in the United Kingdom and that Quinn's acts of murder and bombing were "incidental" to that uprising. The Quinn case is currently on appeal.

Decisions like this led us to initiate negotiations with several of our extradition treaty partners that are stable democracies with fundamentally fair judicial systems. We proposed to these treaty partners that we should eliminate the political offense exception in our bilateral extradition relations for specified crimes, typically committed by terrorists, that involve violence or the threat of violence.

We initiated these negotiations because we had concluded that a serious problem existed in U.S. case law that gave no sign of correcting itself. We also noted that over the last five years the Congress had been unable to correct this problem; and recent protestations that a legislative solution is on the horizon are not persuasive.

We concluded that the best approach was to continue and expand on what we had already been doing -- namely, limiting

the political offense exception on a country-by-country basis. I urge the Committee to compare the U.S.-U.K. Supplementary Treaty with, for example, the U.S.-Canada extradition treaty concluded in 1971 or the U.S.-F.R.G. extradition treaty concluded in 1978. The Senate has given its advice and consent to these treaties, which limit the political offense exception. Those treaties are not qualitatively different from this Supplementary Treaty. The difference is only in the range of offenses for which the exception would be unavailable: the range is somewhat broader in the U.S.-U.K. Treaty. If we had had the insight when our Canadian and German treaties were negotiated, we should have included the same range of offenses in them.

Critics of the U.S.-U.K. Supplementary Treaty argue that it addresses an issue that is not a real problem -- that U.S. courts have allowed terrorists to elude trial in only four cases. We believe, however, that even one case of a terrorist escaping justice is too many. Four such cases in the last few years is an affront to what we stand for; and the prospect that additional terrorists apprehended in the United States may elude trial in the courts of our democratic allies is intolerable.

Some opponents of the Supplementary Treaty have accused the Administration of being anti-Irish, claiming that we are proposing this limitation on the political offense exception only with the United Kingdom. The truth is that we are negotiating similar provisions with other countries, which we would be happy to identify privately to this Committee. I want to emphasize that we intend to negotiate comparable limitations solely with other stable democracies that have fundamentally fair judicial systems.

The first such negotiation that we concluded was with the United Kingdom. The Supplementary Treaty modifies the political offense exception contained in our 1972 bilateral

treaty. The Supplementary Treaty provides that certain specified violent offenses characteristic of terrorist attacks -- such as murder, kidnapping, airplane hijacking, and bombing -- may not be treated as political offenses. The Supplementary Treaty has already been the subject of extensive hearings by the Committee on Foreign Relations. My testimony before that Committee sets forth in detail the origins of the political offense exception and the manner in which the Supplementary Treaty would operate. I respectfully request that a copy of that testimony be made a part of the record here.

I will turn immediately to some of the concerns this Committee has raised with respect to the Supplementary Treaty. This Treaty is fully consistent with the United States Constitution. As you know, the United States may extradite a fugitive to a foreign country only pursuant to a treaty. The United States establishes a political offense exception in our bilateral treaty with a particular state. Most U.S. extradition treaties do not define the political offense exception, thus allowing judges great discretion. As I indicated earlier, however, some treaties, such as our Canadian and German extradition treaties, have limited the exception. The exception is not required by the Constitution, and restriction of the doctrine implicates no Constitutional provision. We recognize, of course, that the Constitution is paramount to any treaty and that a treaty may not contravene the Constitution. This Supplementary Treaty, however, presents no incompatibility with the Constitution.

This Committee has raised seven specific questions regarding the Treaty. I will deal with three of them, and I understand that Mr. Trott will discuss the other four. The Committee has asked, first, about the applicability to the Supplementary Treaty of the European Convention on the Suppression of Terrorism. The European Convention was drafted by the Council of Europe and signed in 1977. The limitations

on the political offense exception to extradition contained in that Convention have been accepted without reservation by eight States. Seven others have ratified the Convention with reservations that essentially preserve their right to apply their respective domestic rules on the question. Three Council of Europe Member States have signed but not ratified the Convention, and two have neither signed nor ratified the Convention. Because adherence to this Convention is limited to Member States of the Council of Europe, and the United States is only an observer to that organization, we cannot become a party to it. As a result, we cannot invoke the Convention, and we are not bound by it.

Nevertheless, the European Convention does provide a highly instructive model for the Supplementary Treaty. The Convention contains restrictions on the political offense doctrine quite similar to those in the Supplementary Treaty. The nations that comprise the Council of Europe and participated in the conclusion of the Convention recognized that such restrictions are fully compatible with accepted principles of international law. These states also recognized that the political offense doctrine should not be used to shield terrorists who strike at democratic regimes. The Supplementary Treaty is very similar in coverage to the European Convention, and in many respects the Treaty's text has been drawn from the U.K. legislation implementing the Convention (the Suppression of Terrorism Act of 1978). In short, while the European Convention is not technically applicable to the Supplementary Treaty, it provides important support for our efforts here. (My office has prepared a comparative analysis of the Convention and this Treaty, which I ask be included in the record.)

A second question presented by the Committee involves the constitutional and legal effect of the Treaty's retroactivity provision. Article 4 states that the Supplementary Treaty will apply to any offense committed before or after its entry into

force, provided that, if the offense was committed before entry into force, it must have been an offense under both nations' laws at the time it was committed. This article is consistent with established practice in U.S. extradition treaties; it is permitted by the Constitution; and it advances important U.S. law enforcement interests.

The United States has entered into supplementary extradition treaties with over 20 nations. Virtually every one of these supplementary treaties was made retroactive to the date the original treaty entered into force. Several (such as the supplementary treaties with France in 1970 and with Sweden in 1983) contain provisions essentially identical to that of Article 4 in this Supplementary Treaty.

U.S. courts have consistently upheld the retroactive application of extradition treaties. For example, in In Re Burt, 737 F.2d 1477 (7th Cir. 1984), the United States agreed to extradite to the Federal Republic of Germany a U.S. citizen accused of having murdered a person in the F.R.G. in 1965. The extradition occurred pursuant to a U.S.-F.R.G. extradition treaty that had entered into force in 1980 and contained a retroactivity clause. The Court of Appeals for the Seventh Circuit held that extradition was proper, even though the applicable treaty had not become effective until 15 years after the crime was committed. Id. at 1486.

Such retroactivity provisions do not violate the ex post facto clause of the Constitution. The Supreme Court has held that an ex post facto law is "any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then described.'" Weaver v. Graham, 450 U.S. 24, 28 (1981) (citations omitted). Article 4 does not offend this clause because the Supplementary Treaty applies only to acts that were offenses in both countries at the time they were committed. Moreover, the Supplementary Treaty does not criminalize any conduct.

Mr. Chairman, we believe that the retroactivity clause is important as a matter of principle. A fugitive should not be able to evade extradition and prosecution simply because he committed his crimes prior to the ratification of this Treaty. We have recognized this principle in numerous treaties, and no sound reason exists for changing it to benefit terrorists.

A third Committee question involves the effect of similar treaties with other governments. As I stated before, the Administration hopes to enter into similar treaties with other states, and some negotiations are under way. We do not intend to propose this revision of the political offense exception with all our extradition treaty partners. On the contrary, we will seek such an amendment only with stable democratic nations -- states that have an open political process and a fundamentally fair judicial system. Our rationale is that, with respect to such nations, violence and terror are totally illegitimate forms of political participation, and persons who engage in such acts should find no sanctuary in our nation.

The effect of similar treaties with our democratic allies will be two-fold. First, terrorist fugitives will have fewer places to hide. Second, we, and our treaty partners, will have underscored our rejection of terrorism as a legitimate vehicle for political change in democratic states; we will demonstrate to the world that we can cooperate with each other to bring terrorists to justice.

The Supplementary Treaty does not, however, affect pure political offenses, such as seditious libel, treason, and the like. As to these, the political offense exception will continue to be available. With respect to violent crimes, such as murder and hijacking, we believe that our nation must take a firm stand against refuge for those who resort to terrorist acts in democratic regimes. The Supplementary Treaty marks an important first step in that direction.

An issue that may be of concern to the Committee is the fairness of the judicial system used to try suspected terrorists in the United Kingdom. The United Kingdom has adopted a variety of measures to deal with terrorism in Northern Ireland, including establishment of a separate system of courts, known as "Diplock Courts," for the trial of terrorist offenses. We have prepared a detailed analysis of the Diplock Court system, and I request that it be made part of the record. Although the Diplock Court system is far from perfect, our study shows that its deficiencies are greatly overstated by IRA partisans and that those courts do provide a fundamentally fair judicial process.

The most persistent criticisms of the Diplock Courts center on two of their features: trial is by a judge, not a jury; and a conviction may be based entirely on the testimony of an accomplice of the defendant, referred to in Northern Ireland as a "supergrass." Before this Committee condemns these provisions, it should consider why they were adopted.

The Diplock Courts eliminated trial by jury because the jury system was in danger of complete breakdown in Northern Ireland. Terrorists were intimidating jurors and creating a widespread fear of retaliation for guilty verdicts. Moreover, few republican suspects were tried by their peers, because juries were composed almost exclusively of loyalists. This raised serious questions of fairness for republican defendants and resulted in few convictions of Protestant defendants. The Republic of Ireland encountered similar problems of intimidation and retaliation in prosecutions of accused terrorists, and it too eliminated trial by jury in such cases. Finally, trial by jury is a basic constitutional right in our country, but it is not considered essential for a fair trial in most legal systems, including many derived from the English common law tradition.

Critics of the Diplock Courts have objected that the conviction rate in non-jury trials in Northern Ireland is 90%. This figure is so high, however, because it includes those who have pled guilty. Even counting those who have pled guilty, the acquittal rate in non-jury trials in Northern Ireland is comparable to that for jury trials there; indeed, in 1984, the acquittal rate in non-jury trials was higher than in jury trials. A more significant measure is the acquittal rate in cases in which the defendant pleads not guilty. Once again, the rates in jury and non-jury trials are comparable; in 1984, the acquittal rate in non-jury trials was higher (53%, compared to 49% in jury trials).

The use of accomplice testimony also was necessitated by terrorist intimidation of witnesses. Often, the only way to obtain testimony against a PIRA defendant has been to offer immunity to one of his cohorts. The outrage directed by some Americans at the use of such testimony is ironic: U.S. courts routinely admit the testimony of accomplices, usually given in exchange for a promise of immunity or leniency, and a conviction may be based solely on such evidence.

In some respects, the Diplock Courts provide greater procedural protection than is available in ordinary criminal cases in the United Kingdom. For example, the judge must issue a detailed written statement of the reasons for his decision. The defendant has an automatic right of appeal, and the appellate court may overturn the trial judge's findings of fact as well as his conclusions of law. In addition, the United Kingdom has maintained intact the most important procedural guarantees: trials are held in open court; witnesses may be called and confronted; the prosecution bears the burden of proving guilt beyond a reasonable doubt; and the accused has an absolute right to counsel.

The United States Government does not endorse every feature of the judicial system used by the United Kingdom for terrorist

offenses. We look forward to the day when normal criminal procedures will be restored. Nevertheless, despite its flaws, the U.K.'s system of criminal justice for Northern Ireland is consistent with fundamental norms of procedural fairness. In fact, even the Republic of Ireland extradites PIRA terrorists to the United Kingdom for trial. A U.S. refusal to extradite terrorists to the United Kingdom, because of perceived defects in its judicial system, therefore would be wholly unjustified.

Finally, Mr. Chairman, I want to raise a question of my own, as uncomfortable as it may make some legislators who have criticized this Treaty. Is the Supplementary Treaty really flawed, or are the increasingly technical questions and objections being raised about it merely a product of vocal support by some in this country for the Irish republican cause? I frankly doubt that such objections would be raised if the Treaty were seen as affecting Libyan, PLO, FALN, or Black Liberation Army terrorists. This Committee, and each member of the Senate, must eventually come to grips with the fact that, however sympathetic he or she may find some of the IRA's ends, the means they have adopted are impermissible, as well as counterproductive. We cannot have our "favorite" terrorists; all who use bombs where they can use the ballot must be condemned. That in fact is what every leading Irish politician in America has said. As the "Friends of Ireland" -- including 45 members of the Senate -- said in their 1984 St. Patrick's Day statement: "We unreservedly condemn the acts of violence on both sides; we renew our urgent appeal to all Americans to renounce the path of the bomb and the bullet and to reject the pleas of those who seek by word or deed or dollar to promote or condone the cause of violence."

This Treaty has a far greater and broader purpose than just reaching Irish terrorists. It applies to all who engage in violent crimes in the U.S. or the U.K., whether Irish, English, Arab, or Jew. It also sets a pattern that we will implement

with all our willing, democratic allies, thereby denying sanctuary in each other's countries to those who use force to obtain ends when the political system is open to change. Finally, it gives me, and Mr. Trott, and every law enforcement officials in America the moral basis upon which to seek the extradition of those who kill and maim Americans here or abroad. If we will not surrender terrorists to our allies, how can we ask them (and others) to surrender such persons to us for trial? We must show the political character and moral strength to live up to the standards we want the rest of the civilized world to follow. If we do not, we will eventually pay a terrible price. If we do, we will eventually reap the benefits in stability and civilized order that we all so earnestly seek.

Senator HATCH. Let me just ask several questions.

Letters from the President, the Secretary of State, and the Assistant Secretary of State, William Ball III, clearly indicate that this treaty is designed to combat terrorism. I do not think that there is any doubt that this is the intent behind the treaty. Both of you have spoken eloquently in regard to that aim.

However, nowhere in the treaty is terrorism even mentioned and I find that to be somewhat shocking. Furthermore, it is not defined in the treaty. What you have, in fact, is a broad proscription of criminal violence and I think we can all agree that we would rather have an identification of terrorist related violence than criminal violence.

I would like to ask you, Judge, how do you explain the ambiguity of the treaty, and why is there not more definition in this treaty, since it seems to me that you are dealing with an area that can be defined and I think, defined relatively well?

Judge SOFAER. I do not think that is true, Senator.

I think that the definition of terrorism is elusive and thus far, we have concluded, I think correctly, that attempts to define terrorism are bound to fail. We have not supported efforts in the Senate or in the House to pass criminal legislation based on definitions of terrorism.

Senator HATCH. But there are some who feel that if you do not define it, it is bound to fail also, because you have made it so broad that you could call anything terrorism.

Judge SOFAER. I do not think so. I think that what you have to do is focus on the criminal activities of people who say they are Republicans or say they are freedom fighters, to get away from these political type of labels and talk about what conduct people can or cannot engage in.

Senator HATCH. Are we not going to decide these matters on a case-by-case basis, because we have not been willing to define what should be done?

Judge SOFAER. No.

If someone murdered somebody in the United Kingdom, and had no political motive whatsoever, they would still be subject to extradition under this treaty. If they made the argument that they were motivated by political concerns, the difference is that this treaty would make the political offense exception inapplicable.

Senator HATCH. I agree with both of you that we should not foster, allow, permit, or enhance anything that consists of terrorist activities. And certainly, I do not think that any terrorist should be protected under the law.

Let me ask you this question. Exactly in what way do you intend to refile extradition charges against the four alleged PIRA members or offenders?

Do you intend to go back in the same jurisdictional forum on the basis of the treaty? Under article IV of the treaty it seems to me, that the procedure would raise serious due process and fundamental fairness questions under our law and under our constitutional law.

Both of you may give me your thoughts on this matter. Mr. Trott, would you comment first?

Mr. TROTT. Mr. Chairman, Judge Sofaer has already spoken eloquently as to the state of the law in this country, and I think that it might be——

Senator HATCH. The state of the circuit law in this country really has not been decided.

Mr. TROTT. No, but I believe that the reasoning that is set forth in these opinions is very sound as alluded to briefly by Judge Sofaer, and it simply indicates that this is not a situation of making something a crime that was not when the act was committed.

This is more in the nature of a procedural device that simply relates to the transfer of one person from a country to another.

And I think that no reasonable person could disagree with the analysis that is found in these decisions. And it is definitely true that if this protocol were to become the law of the land, it would enable Great Britain and the United States, on her behalf, to go back into court and attempt to effectuate an extradition of these criminals back to the country from which they came to stand trial or serve the sentences from which they escaped violently.

That is absolutely accurate.

Senator HATCH. Do you agree with that? You did talk about that.

Judge SOFAER. Absolutely. I do not think that there is anything unfair about it.

Mr. TROTT. No, there just simply is not and there would not be in this country either if an extradition, for example, from Utah to Arizona or New Mexico or California were turned down on a procedural defect, and later on the procedural defect were somehow cured, it would not deprive any individual State of the opportunity to then try the person on the charge outstanding.

The double jeopardy clause applies only to situations where a person is placed in jeopardy on a particular offense. And this issue

of extradition falls completely outside of the ambit of those protections.

Judge SOFAER. If Abu Abbas were to come back to Italy now, there is a warrant for his arrest and they would arrest him and they would reprocess him.

Mr. TROTT. Even though he had been released from the country at one point by executive order.

Judge SOFAER. And we would hope that they would send him here.

Senator HATCH. Do both of you believe that treaties automatically become part of U.S. domestic law, whatever their provision and their legal effect?

Do you both believe that?

Mr. TROTT. I certainly defer to Judge Sofaer, but I do.

Judge SOFAER. Can I get that again, Senator?

Senator HATCH. Do you believe that treaties, themselves, automatically become part of U.S. domestic law, whatever their provisions and legal effect?

Judge SOFAER. Only self-executing treaties do, Senator. I know about your concern in that regard, and I share it, I might add, and in this case, this extradition treaty is self-executing in so far as it has provisions in it, that instruct the courts as to how they ought to interpret provisions.

But beyond that, it does not go.

Senator HATCH. I am concerned that this treaty could apply to true freedom fighters. For example, the Crown Colony of Hong Kong is listed by the treaty as one of the territories for whose international relations Great Britain is responsible. To offer, what if a group of freedom fighters organized to rebel against English control before Hong Kong reverted to the PRC or the Peoples' Republic of China, would they not, also come under the provisions of this treaty?

Judge SOFAER. They might. I have not thought about that problem. I can tell you this, not only is the judicial system left in place, but so is the entire system including the executive system of granting exceptions to extradition in the showing of exceptional circumstances.

The means for ameliorating harshness, for dealing with injustice on a case-by-case basis, remains in our system of law. We are not going to change our nature as a compassionate freedom-loving people by adopting this treaty.

On the contrary, we are doing something principled that we should do, but we remain the American people and we remain sensitive to these concerns. The Secretary of State remains the last word, after the judicial system and can refuse to extradite for these considerations.

Senator HATCH. With only four decisions going against Great Britain's request for extradition, for alleged PIRA offenders, why do you believe that the 1972 Extradition Treaty is not functioning properly or not functioning as it was intended to function?

It seems to me that it looks that way. Do you believe, for instance, that the United Kingdom should be able automatically, to obtain any person for which extradition is requested?

Judge SOFAER. Oh, no.

So long as it complies with law. We disagree with the recent interpretations of the political offense exception. We are hampered in securing——

Senator HATCH. In just those four cases?

Judge SOFAER. In four cases with implications for the law. We are a country of law. Courts are going to look at those decisions and apply them in other areas. And I would not minimize four cases in these recent years. What if another country denied four efforts by us to extradite people who had committed murders here, claiming to be involved in some freedom fighter cause?

There are plenty of such groups. This issue, as Mr. Trott said in his testimony, arises all the time in the courts.

The Brinks robbery case, the Brinks murder case was a case in which the defense was that we were engaged in freeing the blacks of America from political oppression. The FALN bombings, the defendants all raised as their main defense——

Mr. TROTT. The bombing of the U.S. Senate that occurred some time ago, if the persons who did that are ever apprehended, they will certainly claim that it was a political offense, and if we find them in Great Britain, we should not be surprised if they are successfully able to assert the political defense doctrine and not be returned to the United States for bombing the U.S. Senate.

Senator HATCH. Well, would you be willing to amend the treaty? Is this treaty inviolate, or would you be willing to amend the treaty to address the major concerns which legal critics have made against the treaty, including, I presume, some legal critics who will testify today?

Is there any possibility that this may be the way to resolve the matter? Clearly none of us want to encourage terrorism and none of us want to have——

Judge SOFAER. Well, we do not know of any defects in this treaty, Mr. Chairman. We worked very hard on this treaty, especially Mr. Trott——

Senator HATCH. We can point some out to you.

Judge SOFAER. Well, if you feel that there are things that you have doubts about, if you feel that this treaty has self-executing effects that require a reservation or an understanding of some kind, certainly we will discuss it with you.

Senator HATCH. All right.

Mr. TROTT. Mr. Chairman, if I may just correct the record, reviewing my notes, my assistant reminds me that there are really only two outstanding—*Quinn* and *Doherty*—one person, McMullen, has been granted asylum in this country and I think that Macklin has already returned to the United Kingdom, so that there would be two cases that would be active, if this were to go through.

Judge SOFAER. I think the asylum case is very important Mr. Chairman, because it shows that even though the political offense exception will not be applicable, the asylum doctrine will be, and will be applied by our courts, as well as the power of the Secretary of State, to waive extradition.

Mr. TROTT. Mr. Chairman, may I just take an extra 10 seconds?

Senator HATCH. Go ahead.

Mr. TROTT. We have recently lost an extradition case from Spain. Now, we are still in the process of going over the hurdles there, but

we were effectively told by the country of Spain, that a major drug prosecution involving Nicaragua, was, in essence a political prosecution and they cited the concern of a U.S. Senator over the case, as one of the reasons for denying extradition.

This is the pernicious doctrine that has to be carefully circumscribed or we are left to be the victims of all criminals, not just terrorists.

Senator HATCH. Let me ask you this one question that may or may not be related. What about the valid diplomatic passport from Iraq that Abbas was carrying?

As I understand it, he had a valid diplomatic passport from Iraq. Did this grant him diplomatic immunity?

Mr. TROTT. A diplomatic passport is not a safe conduct for a person to go from country to country committing offenses. That person must be duly recognized.

Judge SOFAER. It was a total abuse of the diplomatic passport mechanism under international law, Mr. Chairman, and that is what we have told Yugoslavia and that is what we have told Iraq.

Senator HATCH. Let me turn to Senator DeConcini, for any questions he may have.

Senator DECONCINI. Thank you, Mr. Chairman.

Judge Sofaer, your testimony is well taken, I must say. I have read some of it from the Foreign Relations Committee and although I do not subscribe to all of it, I thank you for the preciseness for which you get to your points.

I do have a couple of questions that I want to ask you but first of all, I want to ask Mr. Trott.

The case that you cite as to the Capitol bombing, if those people ended up in the United Kingdom, does not the existing treaty cover the attempted killing of diplomats and political figures?

Is that covered now under the extradition treaties?

Mr. TROTT. Yes, it covers those types of activities, that is correct.

Senator DECONCINI. There is no question that that bombing was directed toward political figures.

Would you disagree with that?

Mr. TROTT. I would disagree with that. It is not at all clear. It is distinctly possible that somebody could find refuge depending on where they were in the political offense doctrine. The same is true if they were in another country, such as France.

Senator DECONCINI. So, I take it, that you do not think that that bombing in the Capitol was directed toward the Senators, it was directed toward somebody else?

Mr. TROTT. Senator, I am really not at liberty to discuss the details of what I know about that case. I can simply raise the public knowledge of it, as an example.

Judge SOFAER. Well, I can say that there is no exception to the political offense exception in the United Kingdom Treaty at this point. There is a clause in our treaty with Germany, which says that the political offense exception will not apply to the murder or other willful crime against a head of state or head of government or a member of his family.

Senator DECONCINI. What is the situation with our treaty now with the United Kingdom? Does it cover attempted killings of diplomats and political figures?

I do not know.

Mr. TROTT. We believe not.

Judge SOFAER. It covers them, but then it excludes them by the political offense exception, if you are going to apply that exception.

Mr. TROTT. Our analysis would indicate that if the bombing attempt on Margaret Thatcher had been successful the political offense doctrine could have been raised in this country if those persons had been found.

Senator DECONCINI. So the wording in our treaty with the United Kingdom now, that covers attempted killing of diplomats and political figures, is superseded by, if it is upheld, a political offense statement or defense?

Judge SOFAER. That is correct, Senator.

These crimes are covered and then the political offense exception is potentially applicable to them now.

Senator DECONCINI. Now, Judge Sofaer, you indicate that we are only interested in such treaties with democratic countries. I take it that that is because we feel that they are representative of the people and supposedly their leaders are expressing their feelings of what is necessary.

I find great problem with the foundation under which this treaty is put forward today. Here we have a very close ally, perhaps our closest with the strongest ties to our country, that many of us, not all of us—there certainly is a division in this country—many of us feel that are committing atrocities in Northern Ireland without finding a political solution there.

All of a sudden, we are asked to approve a supplemental treaty. It just seems to me that you have perhaps ignored the fact that there is a strong feeling in this country, that our closest ally has not addressed and responded to the legitimate concern of the Irish citizens, both Catholic and non-Catholic in Northern Ireland.

And you make brief reference that some things are happening, because of the talks between Mr. Fitzgerald and the Thatcher government. But the reality is that very little is happening. If you look carefully, since the early 1970's when there was a power sharing effort there, and since then, very little has happened.

How do you explain that, or may I ask this question?

Why have we not attempted to adopt a supplemental treaty with a country where there is not that strong feeling, that is an ally of ours that is not repressing a certain segment of their population? Would we not be better off to do this with Italy or Germany or some country where we do not have real objections to what the government is doing?

Judge SOFAER. We will do this with other countries. We are in the process of negotiating such treaties. I do not accept the premise that it is appropriate for us to do this, let us say, with Italy or Israel, as close as we may be to those countries, and inappropriate to do this with the United Kingdom. I just think that that suggestion is unacceptable.

We are closer with the United Kingdom than with any other country in the world.

Senator DECONCINI. No question.

Judge SOFAER. And it is fitting that we start with our first treaty ally in this respect.

Now, with regard to the strong feelings that many have about the British policy in Northern Ireland, I can only say this, Senator, it is something that I am sympathetic to and a concern that I believe that many people in the Government, in the State Department, are sympathetic to. It is a problem that we work on. It is clear that every student of this problem has recognized that violence sets the cause of Irish freedom back. It does not advance the cause. The violence in Northern Ireland is repeatedly used by politicians on both sides, or on all sides, I should say, as an excuse for not moving forward on a solution.

And most of the studies that I have seen on this problem—and the latest that I have read is the 20th century foundation study on the Irish problem and solutions—are very sympathetic to the Irish cause. The 20th century foundation study ended, with what I think was an eloquent passage—and I will be happy to send it to you, Senator—pointing out that every person who has looked at this issue, however sympathetic he or she may be, regards the violent part of the activities of those who seek freedom for the Irish, as counterproductive.

Senator DECONCINI. I assure you that I join with the Senator from Utah, in total abhorrence and disrespect for the IRA or the Ulster defense force. They are radical, they are terrorism and I have no use for them whatsoever, I refused to meet with them when I was there, and I have no sympathy for them at all.

That is not really my issue. We send a special envoy from the President to the Philippine Islands, Philippine nation with a special message to get your house in order, and yet, we do not send any special envoys to Margaret Thatcher and tell her to get her house in Northern Ireland in order. It is a double standard in this Senator's mind.

Judge SOFAER. I will carry the Senator's message.

Senator DECONCINI. I wish that somebody would.

Senator HATCH. Make that two Senators.

Senator DECONCINI. If, in fact, it has been done, it has been done very quietly and maybe it has been done. I wish that someone would convince me or tell me from authority that that has been done. At least in my conscience I would feel better.

Judge SOFAER. I know that negotiations, important and significant negotiations are under way.

Senator DECONCINI. Are they the same negotiations with the United States?

Judge SOFAER. No. No.

Senator DECONCINI. Well, I am talking about the United States exercising its world leadership, on what I consider a human rights violation by our closest ally. And yet we do this to other countries that are our allies, but for some reason we sit back and say, well, you are our friends and we are so common to you in language and what have you that we have no reason to force this issue with you, but let you be a brown skinned Filipino, by gosh, and you step on somebody, we are going to tell you, we are going to send over our closest ally in the U.S. Senate and tell you to get your house in order.

I wonder why the President does not send the closest ally he has in the Congress or in the Government, maybe perhaps of Irish-

American descent, and tell the Thatcher government that it is time that they get their house in order?

That is one of the problems that this Senator has with this treaty. I am going to be hard pressed to come to a conclusion even after your eloquent justification for it. You make a good case, you really do. But I think that it is on a faulty foundation. It is going to be very difficult to convince this Senator until this Government does something to force the British Government to respond in a responsible manner.

Judge SOFAER. I urge you to look at the words, this treaty deals with violence, that is all that it deals with. It does not deal with legitimate democratic political expression. It does not affect or interfere with efforts, the kinds of efforts that you and I would approve of to obtain freedom or to obtain any other political objective in Northern Ireland.

This treaty is aimed at those types of acts that you abhor.

Senator DECONCINI. I understand that, Judge.

I have no trouble with that. The problem is that I do not think that you can separate the two. I think that you could separate the two in another country that did not have this particular problem facing it.

Judge SOFAER. No; we tried several years ago to get a piece of legislation through, eliminating, or reducing or narrowing the political offense exception with respect to all nations, just generally.

So that it did happen a while ago and it passed the Senate and it did not pass the House.

Senator DECONCINI. Well, I would think that if you were doing this on a general basis, you would have a much better opportunity of convincing members than singling out the United Kingdom, when they had this egregious, I consider very egregious problem on their conscience on a day-to-day basis.

Mr. TROTT. Senator, when we try to do it on an across-the-board basis, then people point to various situations around the world and say, how can you come here and suggest with a straight face, that we send people back to that country, for trial in a system that accords nobody anything even remotely resembling a constitutional——

Senator DECONCINI. Mr. Trott, did you consider negotiating a treaty of this kind with a country that does not have such a controversy ongoing as we have with British Ireland?

Mr. TROTT. Senator, we are fully aware of the system that is used over there, and we think that it accords with basic due process, No. 1.

No. 2, we are aware of serious negotiations that are occurring to address the kinds of problems that you point to. I do not think that those can be discussed publicly by us but there have been references in recent days and—

Senator DECONCINI. Why can't they be discussed publicly?

What are you talking about? Are you talking about the discussions between the Fitzgerald government and the Thatcher government?

Is that what you are talking about or is there something else?

Because if there is something else, there is no reason that we cannot discuss what we know about those things publicly.

I was not briefed over there by our Embassy or by the British Government on a classified basis of what is going on and what is hoped to be achieved there. But nothing has come of that. And we have been doing that for some time.

I think that is a fallacious argument.

Mr. Chairman, I thank the chairman for his indulgence and the witnesses.

Senator HATCH. Thank you.

Let us turn to Senator Grassley.

Senator GRASSLEY. Judge Sofaer, you made a case that this was not precedent setting because we previously had done this with Canada, and West Germany. Explain to me the extent to which this treaty goes further than our political exceptions do for Canada and West Germany and then how that might be setting the stage for what you say will be further treaties negotiated with other countries, and whether or not you would perceive them to be along the line with this treaty, or maybe they would even go further than we have so far?

So, generally speaking, why the movement from where we were with Canada and West Germany to this supplemental extradition treaty before us?

Judge SOFAER. Well, if I may, Senator, our treaties commonly have a list of the kinds of crimes that each nation, reciprocally, will extradite for. Then, they have the political offense exception in it and what we did with Canada, in 1974, is that we narrowed the political offense exception with respect to kidnaping, murder, or other assault against the life or physical intergrity of a person to whom a contracting party has the duty, according to international law, to give special protection—diplomatic type of people—and any unlawful seizure or exercise of control of an aircraft by force or violence, or threat of force or violence, or by any other form of intimidation.

Then, in connection with Germany in 1978, we narrowed the political offense exception in a way that is really quite common. We have done that in several treaties. We have a clause about the head of government that I referred to earlier and then we have a clause that I think is very important and it was a very important step in the right direction—any offense which the contracting parties or the requesting state have the obligation to prosecute by reason of a multilateral international agreement such as, the Hague Convention, the Toronto Convention, these conventions against hijacking.

So we started the process with those treaties, advanced the process of recognizing that we would not honor the political offense exception, when our multilateral obligations with respect to these democratic regimes required us to extradite. They are terrorist type of activities, these activities that we are talking about. We have realized, we have learned over the years, that we need to expand that list—we need to include bombings. We need to include the other crimes that we have listed in the new supplemental treaty with Great Britain and that is what has led to this more comprehensive list of offenses. That includes killing, maiming, bombing, carrying a loaded weapon with intent to use it, and those kinds of——

Senator GRASSLEY. Well, really what you are saying, is that we are making our treaty more up to date, as far as what the political facts of life are.

Judge SOFAER. Exactly.

Senator GRASSLEY. And you would anticipate that we would follow that same process, in future negotiations with other countries, would you even hypothesize that we would go back, maybe and update the treaty with Canada and West Germany?

Judge SOFAER. Definitely.

Senator GRASSLEY. OK, that answers that question.

On another point——

Judge SOFAER. But with democratic regimes that have an open political process and a fundamentally fair judicial system.

Senator GRASSLEY. OK, now, under this supplemental treaty, who in the State Department will decide or by what process will the decision be made in determining if a political offense exception exists?

Judge SOFAER. No. The courts will decide that. The treaty is negotiated in a process which has to have the concurrence of the executive branch——

Senator GRASSLEY. But the State Department, under this treaty is a part of the process now that they are not under the existing treaty, right?

Judge SOFAER. Well, the State Department is a part of the process but the cases are prosecuted in the courts. And it is the courts that will apply the political offense exception. If someone is found extraditable, despite the political offense exception, as the results of these treaties, then the Secretary of State still has the discretion to refuse to extradite.

But otherwise the cases will be prosecuted in the same way that they are now. It is just that fewer people will be able to assert the political offense exception.

Mr. TROTT. But the judge, hearing the case, will be the person in the first instance who will decide whether the claim is valid and the judge will refer to this language in this supplementary protocol to make that determination.

But there is a double protection, as the judge points out and then it is still up to the Secretary of State exercising discretion to decide whether or not the extradition shall be granted.

Senator GRASSLEY. Would you comment on the argument that will be made by a subsequent witness that the extradition decision, under the supplemental treaty, could be challenged by habeas corpus on the grounds that human rights may be violated by this surrender?

Judge SOFAER. Well, habeas corpus is available and legitimate sufficient claims would be heard in the habeas corpus process.

If there were some human rights claim that were sufficient, it would be entertained. We are not trying to change our judicial system. We are trying to modify one of the rules, one of the many rules that applies in extradition proceedings, to make it—as you put it Senator Grassley—more up to date with the political times.

Senator GRASSLEY. Mr. Chairman, I have no other questions.

Senator HATCH. Well, thank you, Senator Grassley. I want to thank both of you. You have enlightened the committee and we appreciate what you have to say.

I tend to agree with Senator DeConcini. The message sometimes that is sent here, by choosing this particular treaty as the incipient exception treaty, has the United States maybe coaligning itself in some degree with Great Britain in this very volatile difficult problem that all of us are concerned about in Northern Ireland.

Judge SOFAER. Yes; we are aligned with Great Britain and the problem of terrorism is not just Catholic terrorism. It is Protestant terrorism or any other kind. They had Libyan terrorists.

Senator HATCH. Well, there is even in the political question of whether or not Great Britain should be over in Northern Ireland. You know, there is a big political question there, whether you are on one side or the other.

Judge SOFAER. I do not think that this is an indication that we are on one side or the other of the Irish issue.

Senator HATCH. There are a lot of people who feel that it is an indication.

Judge SOFAER. Well, I think that they have to be more rationale about it. You have to look at the words of the treaty and see where it is applying.

If the Libyan who was engaged in that brutal murder of some demonstrators outside of their Embassy in London, managed to find his way to the United States, he would assert the political offense exception. It might be upheld and this treaty would require his extradition, despite the existence of the political offense exception.

This treaty is not written in terms of Catholic or Protestant or anything else. It has to do with the type of conduct that people are allowed to engage in. That is its political message.

Senator HATCH. I think that you made that case rather clear.

Mr. TROTT. Senator, on behalf of the Justice Department, I must say that that is the case also. We are very sympathetic to grievances, wherever they occur, but we are simply saying, please use process rather than violence to resolve these. That is all.

Senator HATCH. All right.

I want to thank you both for coming.

Judge SOFAER. Thank you, Mr. Chairman.

Mr. TROTT. Thank you, Mr. Chairman.

Senator HATCH. Our next panel will consist of Prof. Christopher Blakesley, currently a professor of law at the University of the Pacific, McGeorge School of Law, who was formerly an attorney in the Office of Legal Advisor of the U.S. Department of State, and tenured associate professor of law at the Louisiana State University Law Center. Professor Blakesley has taught in France, Austria, and Hungary and has written extensively in American and European books and periodicals on matters of extradition, comparative law, comparative and international penal law as well as other subjects.

John F. Murphy, is a professor of law at the Villanova University School of Law. He has been a member of the legal profession in a number of capacities, including a former professor of law at the University of Kansas, a private attorney, an attorney for the Office

of Legal Advisor in the Department of State, and he is also a member of numerous law related societies, including the American Society of International Law, and the International Law Association Committee on Legal Aspects of International Terrorism, which he currently directs.

Our next witness will be Ambassador Louis Fields, Jr., who is currently a partner in the Washington law firm of Vance, Joyce, Kappah, Long, Fields & Cromwell. He served as U.S. representative to the Conference on Disarmament with the rank of Ambassador from September 1981 to January 1985. Ambassador Fields has served in several positions in the U.S. State Department, including Assistant Legal Advisor for Political and Military Affairs, and Assistant Legal Advisor for Special Functional Problems.

Last, but certainly not least, is the distinguished professor and public servant, Gordon Brewster Baldwin, currently a professor of law at the University of Wisconsin. He has received a bachelor's degree from Haverford College, and a law degree from Cornell University. Professor Baldwin has served the legal profession in a number of positions including the Stockton professor in the U.S. Naval War College, Fulbright professor in a number of Middle Eastern nations, counselor for the Department of State and the U.S. delegate to the U.N. Conference on Charter Review.

We want to welcome each of you to the committee today and Professor Blakesley, we will start with you first.

Due to other commitments, your testimony will have to be limited to 10 minutes each.

STATEMENT OF A PANEL CONSISTING OF CHRISTOPHER L. BLAKESLEY, McGEORGE SCHOOL OF LAW, SACRAMENTO, CA; AMBASSADOR LOUIS FIELDS, ESQ., WASHINGTON, DC; JOHN FRANCIS MURPHY, VILLANOVA UNIVERSITY SCHOOL OF LAW, VILLANOVA, PA; AND GORDON B. BALDWIN, UNIVERSITY OF WISCONSIN LAW SCHOOL, MADISON, WI

Professor BLAKESLEY. Senator Hatch, thank you very much.

I appreciate this opportunity and I am honored by it. What I think that I will do, since our statements will be entered into the record, would be to respond specifically to some statements made by the former witnesses.

Perhaps to begin with, it seems to me that the most relevant, the most important question was, assiduously avoided by both Judge Sofaer and Mr. Trott. It seems to me that it was avoided mainly because it is the weakest issue with which they have to deal. And that is, the role that they see the courts playing in this extradition process and the impact that this elimination of the political offense exception from the treaty with Great Britain would have on our domestic judicial system.

I think that it would have a significant and detrimental impact. Their statements were eloquent and even politically brilliant but I think that I emphasize the word politically brilliant, advisedly. I will get to the point. They suggest that the political offense exception promotes terrorism and, therefore should be removed from the treaty.

It seems to me that every single example that they raised, from the Libyan shooting out of the window in Britain, from the TWA hijacking and the killing of the off-duty, civilian-clothed naval person, Mr. Stethem, are examples used because of their political impact, because everybody is outraged by those examples and they are clearly examples of terrorism. It seems to me, however, that if we apply the approaches already adopted by most of the American jurisdictions that district courts around the country and the tests adopted by the courts in other countries, those individuals would be extraditable under the current standards of today's law. Under the current state of the law, extradition would be appropriate in these cases. Thus, the administration sets up a "straw-man" and destroys it.

Now, it would be tragic if a mistake were made. If a court erred in making this decision as to whether or not those acts fit within the political offense exception even though they were of such a wanton and violent nature directed to essentially civilian targets, that would be a tragedy. And it would be a judicial error. And it seems to me that we would be upset by that.

But to make the decision that because there have been judicial errors made and will possibly be judicial errors made in the future, we should rule out the judiciary's opportunity to render this decision, which is quintessentially and constitutionally judicial, I think, is of tremendous impact and of tremendous impact domestically as well as internationally. It has always been the judiciary's role to decide questions of law and fact relating to human liberty.

I think that the impact represents a realization of the belief that judicial decisions sometimes are wrong and uncomfortable for us and therefore we need to avoid having that happen. The easiest way to avoid that happening, so goes the belief, is to remove the decision from the Judiciary. Let me focus on another aspect, the hypothetical put by you, Senator Hatch, vis-a-vis Hong Kong.

Assume per chance that that were to occur, that there were a rebellion, a revolt and fighting, military combat that occurred during this coup and that one of the parties on the side of the current government, killed some individuals who were attacking him or her. Even in self-defense. Lets assume further that individual eventually found him or herself in the United States and an extradition request were made by the successful former opposition pursuant to this treaty—to which the new government would have succeeded.

It seems to me that the courts would be bound to find the person extraditable, they would not be allowed to consider whether or not they were becoming an arm of a victor's justice and sending back the defeated patrons of a cause—the former government.

Second, if it goes to the State Department for a decision, after that, and the decision were made by the Secretary of State in his discretion not to extradite that individual, it should be understood that that would be in violation of the treaty and we would have to face the consequences of that, which suggests also, I think, a perspective not of disrespect, but certainly of admitting the availability and perhaps desirability in some circumstances, of disregarding our treaties.

So, it suggests disregard, if not disrespect for the courts, and disregard of our treaty obligations. This is clearly so in the Government's so-called safety-value or backup position in protecting against those who would be, perhaps friendly to us, whose extradition were sought.

So, it seems to me, and in my paper that will be in the record, I go step by step to establish the approaches taken by our courts and courts of other countries which do provide right now sufficient capacity to extradite terrorist or perpetrators of wanton violence. The approaches need to be perfected with the instruction of the legislature, if you ask me, as to how to draw this difficult line between terrorism, wanton violence, and what would normally fit within the political offense exception. As simple a mechanism as making the decision on extradition appealable by both sides would help a great deal and eliminate much error.

That line can be drawn today. Errors will be made today, but it can be drawn right now. It can certainly be drawn more easily if scholars, judges, and the legislature focus on the issue and provide guidelines. I think that that is our responsibility. Not to say, let us take these important question away from the courts, and eviscerate the role that has been traditionally the role of the courts in this arena, but to provide guidelines and a means of diminishing or eliminating error.

So, I think that it does clearly have an impact on the courts and my statement provided for the record details the specifics of the danger that it presents to our system of Government.

That is all the time that I will be needing.

Senator HATCH. Thank you, very much.

[Prepared statement follows:]

PREPARED STATEMENT OF CHRISTOPHER L. BLAKESLEY

Mr. Chairman, members of the Committee, I am honored to be before you to testify regarding the Supplementary Convention to the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, which was signed on June 25, 1985 and transmitted to the Senate on July 17, 1985.

I am here as a professor of law who writes and teaches on the subject of extradition. I do not represent any organization or client. I formerly worked as attorney-adviser in the Office of the Legal Adviser in the Department of State on matters of extradition.

I will begin with some introductory remarks which will focus on the portion of the supplementary treaty which effectively eliminates the political offense exception, and on the statement made by the Legal Adviser to the Department of State, the honorable Judge Abraham D. Sofaer, made in favor of the Supplementary Treaty, on August 1, 1985. My purpose is to show that the attempt to fight international terrorism by way of an evisceration of the political offense exception to extradition is not an efficient means of fighting terrorism and, more dangerously, is inconsistent with our constitution, legal traditions and social values. It is my position that elimination of the political offense exception will undermine the role of the judiciary in an area which the constitution and legal tradition require that the judiciary play a role. When questions of fact and law related to individual liberty are at issue, the judiciary is the constitutionally mandated institution to decide. To undermine this role, by use of a treaty or any other means, and even in a piece-meal fashion, tends to weaken the principle of the constitutional separation of powers.

The proposed Treaty presents such a danger. Article I "amends the political offense exception to extradition, contained in Article V, paragraph (1)(c) of the current extradition treaty, by identifying particular crimes that shall not be regarded as offenses of a political character."[1]

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THEME OF AND DEFECTS IN GOVERNMENT'S POSITION

Judge Sofaer argued the Government's position on the need for the proposed treaty by setting up a straw man. He argued that the political offense exception is measured by the motivation or purpose of the actor, and that the judiciary is incapable of distinguishing acts of wanton terrorism from political offenses. He then destroyed the straw-man by suggesting that allowing such criminals to avoid prosecution promotes terrorism and, therefore, the political offense exception must be eliminated vis-a-vis the listed offenses. Judge Sofaer argued the Government's position in the following terms. Some courts have applied the political offense exception to extradition so as to refuse to extradite fugitives in some cases in which the Government believes the fugitives were terrorists. The political offense exception, therefore, must not be applied to any crimes which may be committed by terrorists. The political offense exception, therefore, must not be applied to hijacking or aircraft sabotage, to hostage taking or crimes against internationally protected persons. Further, the exception must not apply to murder, manslaughter, malicious assault, kidnapping, or property damage. The political offense exception must not apply to these offenses, argued Judge Sofaer, because terrorists sometimes commit them and its application runs the risk that courts will not find terrorists extraditable, thereby allowing those who have committed wanton acts of violence to avoid prosecution and their just deserts. The argument is

simple. The risk that terrorists will escape justice via the political offense exception is so serious, apparently because it hinders our fight against terrorism, that we must eliminate the exception. The benefit of eliminating the risk of losing terrorists is worth the cost of eliminating the political offense exception.

Underlying this rationale is the belief that courts are generally unable, or at least fail too often, to render appropriate decisions on the political offense exception; they cannot or do not distinguish wanton and terroristic from non-terroristic conduct. It is true, no doubt, that courts have made errors in the past and that they will make errors in the future on this and other subjects that come before them. The question for the Senate and the American people is whether the risk of erroneous decisions on questions of terrorism and the political offense exception is so serious that we are willing to remove from the judiciary the authority to render decisions on these matters which are quintessentially and constitutionally judicial. Is the risk of error so great as to allow us to eliminate the role of the judiciary in part of the arena constitutionally mandated to the courts, that of decision-making on matters of human liberty.

I submit that the risk to our constitutional system, caused by removing the issue from the judiciary, is far greater than the risk that judicial decisions are going to promote terrorism. It is not necessarily true, as suggested by Judge Sofaer and the Executive Branch, that the war on terrorism will not succeed if the the political offense exception is not eliminated.

The question is whether or not we wish to enter into a treaty which reverses our cultural and legal tradition of not allowing our Executive Branch to replace the judiciary and thereby put at risk the paramount constitutional principle that

the judiciary decide questions of fact and law relating to human liberty. To allow this erosion may well undermine the extradition process as an institution controled by the rule of law. The implications of this evisceration are important and dangerous, not only to our foreign policy, but also to our domestic constitutional system.

Close scrutiny of the specifics of the proposed treaty and of Judge Sofaer's statement supporting it will serve to illustrate the misleading nature of the statement and the dangers the treaty poses. Judge Sofaer's statement is misleading and its conclusion that the treaty is appropriate is dangerous in several ways. For example, Judge Sofaer indicated that the amendment recognizes that "terrorists who commit the specified, wanton acts of violence and destruction should not be immune from extradition, merely because they believe they were acting to advance a political objective.[2] I cannot quarrel with such a recognition in general. One certainly does not wish to have persons who have perpetrated wanton acts of violence escape extradition and prosecution. Judge Sofaer's statement, however, suggests that the sole or most significant test applied by the courts for the appropriateness of the political offense exception or defense is the "political motivation test". It is not. There are several tests developed by United States and foreign courts which are more commonly applied and which allow the courts to distinguish terroristic acts of wanton violence from those subject to the political offense exception. These approaches are presented below. In addition, Judge Sofaer's use of the phrase "...terrorists who commit the specified, wanton acts of violence ... should not be immune from extradition..." suggests that the current state of the law relating to the political offense exception would allow "wanton acts of violence" to fit within the protection of the defense or that the courts are incapable of distinguishing "wanton acts of violence" or "terrorism" from

political offenses. Neither of these inferences is true. The current state of the law regarding the political offense exception to extradition does not provide immunity to perpetrators of wanton violence or terrorists. The Government's argument that the political offense exception promotes terrorism, therefore, is inapt. The Government wishes to amend an extradition treaty in a manner that will undermine the role of the judiciary in an area for which the judiciary has been constitutionally mandated to act. The danger of the proposed Treaty is that it has as its primary rationale for the need for its existence the view that the legal decision as to whether or not an act of violence is wanton, and therefore not a political offense, is one that cannot, and thus must not, be made by the judiciary.

Under the current state of the law, however, both nationally and internationally, the courts are capable of distinguishing wanton acts of violence from political offenses and of allowing extradition of fugitives who have committed the former. There are many other tests which are more acceptable than the political motivation test for determining the appropriateness of the assertion of the political offense exception. These tests will be analyzed below and they should provide sufficient standards for courts properly to accomplish their task. It is true that none of the theories nor the application thereof is perfect. There may be no perfect or even definite line between "wanton violence" or terrorism and "political offenses", but the courts are the institutions constitutionally designed to draw lines in difficult circumstances. The courts, like any institution or person, may err occasionally, but they are capable of distinguishing wanton violence and terrorism from crimes fitting within the political offense exception to extradition. The studies emenating from the Senate and House of Representatives in relation to the proposed federal criminal code have provided

guidance as to how the line ought to be drawn and the bills propounded therein have shown that it is possible to make the differentiation.[2a]

FOCUS ON THE SPECIFICS OF THE PROPOSED TREATY

Specifically, the Supplementary Treaty seeks to exempt hijacking, sabotage of aircraft, crimes against internationally protected persons, including diplomats and hostage taking, among other offenses, from coverage under the political offense exception to extradition. These are probably appropriate exemptions. These crimes appropriately may be, and indeed likely already are exempted from the political offense exception, under the current state of the law, although Judge Sofaer claims that they are not.[3] Thus, extradition would likely be available for them without the proposed treaty. If the Government wants to be certain that this conduct would not be excepted from extradition, it seems appropriate to indicate that these offenses are now excepted from the defense. It should also be noted that, however, that Judge Sofaer suggests[4] that generally the state with custody of the fugitive cannot, for jurisdictional reasons, prosecute persons who have committed these offenses of hijacking and sabotage of aircraft, piracy generally, or crimes against internationally protected persons. This is not accurate. These are offenses of such magnitude and danger that they provide jurisdiction to prosecute persuant to the universality principle of jurisdiction (and persuant to several multilateral treaties, such as those on airplane hijacking and sabotage, and that on punishment of crimes against internationally protected persons including diplomatic agents, for example).[5] In addition, jurisdiction obtains, under the protective principle of jurisdiction, in any country whose sovereignty, national security or other important governmental interest is engangered.[6] Thus, it is misleading for the Legal Adviser to suggest that prosecution for such crimes would not be possible. Prosecution

by the state obtaining jurisdiction over the perpetrators would be available.

Notwithstanding the misleading nature of the Legal Adviser's statement on these points, exemption of these offenses from coverage by the political offense exception would be consistent with current extradition law and practice. Exemption of these offenses from the defense would be an analogue to the famous "clause Belge" or "clause d'attentat", whereby virtually all nations in their various treaties of extradition have exempted from the defense those who have assassinated or attempted to assassinate heads of state or their families.

The other listed crimes for which the political offense exception would not apply persuant to the Government's proposed treaty includes murder, manslaughter, malicious assault, kidnapping and specified offenses involving firearms, explosives, and serious property damage. It does pose a problem to lump these offenses together with hijacking, piracy and crimes against internationally protected persons. Murder, malicious assault, manslaughter, etc. are common crimes. They are also offenses committed wantonly by terrorists against innocent, non-military targets. On the other hand, and this is crucial, they are also crimes which could be charged by the winning side against its opponents in virtually any civil war or significant insurrection, even though the conduct was engaged against military targets during armed combat. Excepting these offenses from the political offense exception would prevent courts from determining whether or not the conduct occurred under those circumstances. It would allow, indeed, require, extradition even in cases in which the conduct was necessary in self defense, as defenses such as that are not assertable at the extradition hearing.[7]

True, murder, manslaughter, malicious assault are heinous crimes. War, also, is heinous. But this begs the question. The

question is whether or not we wish to enter into a treaty which reverses our cultural and legal tradition of not allowing our state institutions to participate in a victor's justice. Even more dangerously, it puts at risk the paramount constitutional principle that the judiciary decide questions of fact and law relating to human liberty. To allow this erosion may well undermine the extradition process as an institution controled by the rule of law. The implications of this evisceration are important and dangerous, not only to our foreign policy, but also to our domestic constitutional system.

Judge Sofaer's statement indicated that more treaties would take a similar tack. If the Supplementary Convention with Great Britain under consideration were finally promulgated, one must ask what does that suggest will be done with regard to treaties with states such as South Korea,[7a] South Africa, El Salvador, or the Phillippines. There are some states states seen as having strategic importance to the United States, but also having a somewhat less than good reputation for democracy and fairness to political enemies. Indeed, there is evidence that the regimes have used their criminal laws and procedure to harass and eliminate political opposition. We need to ask ourselves if we want our Executive Branch deciding matters related to human liberty, faced with the political and strategic pressures extant today. The evisceration of the political offense exception would tend to allow the risk of our Government participating as part of these states' "long arm of the law".

There are additional serious practical implications that must be addressed. We ought to ask ourselves the following hypothetical question. Suppose that we entered into this treaty with a friendly ally of longstanding. Although it is unlikely and one would hope that it will never happen, suppose also that tensions developed domestically for that ally to the point that

civil war and a revolution occurred, wherein an opposition government became ensconsed in power. The treaty, as amended by the Supplementary Convention, would require us either to extradite those who had fought and caused death or property damage through their fighting, or to violate the treaty. Obviously, the result and any choice we would be required to make would be unhappy ones. The proposed treaty in those circumstances would either cause us to extradite fugitives who ought not to be extradited or to make a mockery of the treaty and the rule of law.

It should not be forgotton that the courts themselves, both in the United States and abroad, have developed approaches to the application of the political offense exception, such as the so-called "wanton violence" or "violence against civilian population" exception, [8] which provide the foundation for a judicial determination of whether or not conduct of a given fugitive was a political offense or mere terrorism. Thus, the current state of the law, both domestically and internationally, already provides methods for the courts to differentiate between "terrorists" or wanton killers of innocent people and those who kill active-duty military personnel or damage government property during a political/military uprising. There is a difference between a hijacking and a skirmish between non-governmental fighters and governmental military personnel.

Judge Sofaer suggests that the killing of Robert Stethem on TWA-847 would not be an extraditable offense.[9] The distinction between the killing of an off-duty, civilian clothed military person during the hijacking of a civilian aircraft, and a firefight during a civil war seems significant enough that courts could make it. Extradition persuant to our anti-hijacking treaties and the modern approaches to distinguishing acts of wanton violence or terrorism would likely render the perpretators

of most acts of murder extraditable. The same thing is true for piracy and hostage taking of innocent civilians at sea. The recent tragic piracy on the Achille Lauro would fit within the parameters of our extradition treaty with Italy and, although the political offense exception is part of that treaty, the courts could certainly determine whether or not the violence and hostage taking was perpetrated against innocent civilians and not opponent military.[9a] To suggest otherwise and to base the need for the amendment of the treaty, and the concommitant removal of the question from the judiciary, on that assumption is misleading and inappropriate. True, if the judiciary must make this decision, it might make a mistake. A mistake would be tragic. But, even if the Government believes the Executive Branch would not make such mistakes, it seems the judiciary, armed with jurisprudence developed over the past two-hundred years and the constitutional mandate to decide issues of fact and law involving human life and liberty is best equipped to render decisions which will more likely do justice in the individual case. Even more importantly, failure to leave this as a judicial prerogative is a failure to abide by the primordial constitutional principle of checks and balances, the separation of powers, and the notion that questions of law and fact relating to human liberty are within the province of the judiciary.

The Senate should note that the fundamental question underlying the deliberations on this proposed treaty is whether eliminating the risk of error, and it is doubtful that the elimination of the political offense exception would do that, in these cases is worth the concommitant damage that the Government's approach would risk to our basic constitutional system. Given our constitutional system, the risk of error in matters of extradition like in matters of criminal law generally is perhaps the price of liberty. It is shocking that the Government, in the face of the Constitution, should suggest that

such decisions ought to be made by the Executive Branch. The Senate should understand the implications of a decision to remove this type of decision from the judiciary and to place it in the Executive Branch, even if it is said that it is being done in a mere bilateral extradition treaty.

Thus, the conceptual and theoretical framework for deciding whether or not an act is one of terrorism or whether it fits within the political offense exception is available. Work at development of more efficient or just models or approaches needs to be and is being undertaken, but that is not to say that the courts are incapable of applying the current standards in a manner that will not only assist in the battle against terrorism, but which will maintain the integrity of our constitutional system of checks, balances, the separation of powers and the integrity of the judiciary. The proposed treaty assumes that courts are too incompetent or otherwise incapable of deciding questions of law and fact relating to human liberty. The Executive Branch has proposed a treaty which will remove the judiciary and usurp for itself the quintessentially, and constitutionally mandated, judicial calling, because the Executive Branch and the British Government have not been happy with the results in some cases. The Senate and the American people should be aware of that reality and understand its implications.

To enhance the Committee's understanding of the political offense exception and to provide additional material for consideration in this important debate, a discussion of the development of the political offense exception and the various approaches to its current application around the world is in order. This analysis will show that the conceptualization of the defense by the systems with whom we relate in extradition matters provides the necessary theoretical vehicles for courts to fight terrorism while not eroding our basic institutions.

POLITICAL OFFENSES: HISTORICAL AND CONCEPTUAL BACKGROUND

The political offense exception to extradition is one of the more controversial topics in extradition law today. This is because, paradoxically, it is one of the most universally accepted and one of the most universally contested rules of international law.[10] It is contested heatedly, because it is generally invoked by many who have participated in wanton violence ("terrorists") and who, therefore, should not be able to succeed in receiving its protection.[11] Sometimes, it is difficult to decide whether the conduct which generated the criminal charge and the claim of political offense fits the criteria for the exception. Sometimes courts err. Errors regarding its application are difficult to accept. Hence, the Legal Adviser to the Department of State has called for the removal of the exception from judicial determination. A discussion of the conceptualization and traditional role of the political offense exception and difficulties regarding its application is in order.

Three basic types of conduct have been found to be exempted from extradition via the political offense exception.[12] The exemption applies to those charged with offenses that may be called "purely political offenses" such as treason, sedition, or espionage. It may apply to "offenses of a political character" or common crimes like burglary or homicide when they have a political character. It may apply when the requested state's officials believe that the extradition was requested for a political purpose.

There does not appear to be a significant problem with the application of the defense for the so-called purely political offense.[13] For example, when the Allies sought the extradition of William II of Germany from the Netherlands after World War I

by invoking article 227 of the Versailles Treaty, the Government of the Netherlands rejected the request as being based on a political offense.[14]

The more difficult application of the defense is in relation to the "crimes, the circumstances of which give them a political character". This "type" may be broken down into several more specific approaches incorporated by the judiciary of various countries for determining whether the defense or exception to extradition ought to apply.

Virtually all extradition treaties contain the political offense exception or defense. Yet, in spite of its universality, no extradition treaty and virtually no legislative act attempts to define what is meant by the terms political offense and offense of a political character.[15] Thus, courts have had to provide the guidelines for determining whether or not an offense committed in a particular case falls within the exemption. The term "political offense" has been characterized as referring not to a well-determined criminal transaction which can be specified in terms of a moral and mental element, but is a "descriptive label" to be considered vis-a-vis otherwise extraditable offenses.[16] This view of the political offense exception provides insight into the various approaches to its application by the courts. The political offense label may be applied by a court in any case in which extradition is requested. The political offense label may be applied by a court in any case in which extradition is requested. Basically, the political offense exception obtains for any extraditable offense, which, depending on whether the approach by the given court is subjective (i.e., based on what is in the author's mind) or objective (i.e., based on the nature of the interests injured or the external characteristics of the conduct) affects the <polis> or socio-political order.[17] The various tests or approaches, developed by United States and foreign courts, include: the political

motivation test (subjective); the injured rights theory (objective); the model of connexity; the political incidence or disturbance test; and the mixed approach (combines the political incidence, connexity, and motivation tests). The mixed approach includes the doctrine de gravite, wherein extremely serious offenses cannot qualify - related to the notion of offenses against the social structure, rather than government). The more significant of the mixed approaches is the Swiss "proportionality theory", wherein the conduct must be linked to a political conflict and the conduct must be commensurate with the gravity of the political disturbance or the political goal to be achieved. These approaches provide mechanisms for distinguishing between wanton violence or terrorism and what ought to be exempted from the extradition process by the political offense exception. They will be discussed in detail below.[17a]

The subjective approach focuses on the intentions of the perpetrator of the alleged crime.[18] Thus, the "political motivation test" has been applied on a few occasions by the French[19] and American[20] judiciaries and criticized vociferously by many, including the Legal Adviser.[21] For example, some American decisions have hinted that the motivation behind the offense may be considered as a separate test for determining the political character of the offense.[22] Judge Sofaer's criticism of the political motivation test, contrary to what his statement suggests, is not inconsistent with the current state of the law regarding the political offense exception. For example, the juridiaries in France, Switzerland, and the United States have moved clearly away from that test. The French courts appear now to have begun to follow the "predominance test" or "proportionallty theory", a form of "mixed approach" developed by the Swiss jurisprudence. This test appears to use both subjective and objective criteria to determine whether a given offense is of a sufficiently political character to warrant

exemption of its perpetrator from extradition.[23] The test was refined in 1951, by the opinion in the Ockert case, in Switzerland, where the court defined as being political offenses, those "acts which have the character of an ordinary crime appearing in the list of the extraditable offenses but which, becaue of the attendant circumstances, in particular because of the motive and the object, are of a predominantly political complexion."[24] The definition of the political offense was modified by the Swiss again in 1952, so as to provide the flexibility to allow exemption from the extradition for those who commit a crime, such as air piracy, in order to escape from a "modern totalitarian regime."[25] In 1961, the Swiss Federal Tribunal summarized the jurisprudential development of the basic tenents of the preponderance test and further refined the definition of political offense so that even when the motive is largely political, the means employed must be the only means available to accomplish the end pursued.[26] In Ktir, the court granted a French extradition request for a French national who was a member of the Algerian Front de Liberation Nationale (F.L.N.) who had been charged with having murdered another member of the Algerian Front de Liberation Nationale (F.L.N.). The court stated:

> [A]lthough . . . he acted for political, not personal, reasons, [i]t does not, however, follow that the act had a predominantly political character. For this to be the case it is necessary that the murder . . . [be] the sole means of safeguarding the more important interests of the F.L.N. and of attaining the political aim of that organization. That is not so [here]. . . . That murder was primarily an act of vengeance and terror. Its relationship to the political aims of the F.L.N. is too loose to justify it and to give it a predominantly political character. . . .[27]

The court made it clear that for the political offense exemption to apply, the circumstances to be considered, the motives inspiring the acts by the accused fugitive, and the purpose behind them must all indicate that the acts were predominantly political in character. The test,

> presuppose[s] that the act was inspired by political passion, that it was committed either in the framework of a struggle for power or for the purpose of escaping a dictatorial authority, and that it was directly and closely related to the political purpose. A further requirement is that the damage caused be proportionate to the result sought, in other words, that the interests at stake should be sufficiently important to excuse, if not justify, the infringement of private legal rights.[28]

Thus, under this test, extremely serious offenses would rarely succeed in being exempted from extradition. A crime such as murder would be required to meet the "ultima ratio"; i.e., that it was the only means to accomplish the political end sought.[28a]

Thus, the judiciaries of several countries with whom we have consistent relationships in extradition matters have developed standards for determining what is a political offense and distinguishing it from wanton terrorism.

Although some Anglo-American courts have applied or hinted at applying the political motivation test, the test developed and applied by-and-large over the years has been the political incidence test. In 1891 a British judge provided, perhaps, the earliest Anglo-American definition of the "relative political offense," and established the political incidence approach,[29] ruling that political offenses are those which are "incidental to and form a part of political disturbances."[30] The political offense exception was applied in Castioni to deny the extradition

of a fugitive who was being sought by the Swiss Government for a fatal shooting allegedly committed by him while he was participating in a violent political demonstration. This is an example of the objective approach. It focuses on the act, without attention to the author's motivation.[31] It forms a sub-category of the objective approach: the so-called "political incidence theory or approach."[32]

Since that time, United States and British decisions have tended to adopt this approach. In 1894, a United States court held that the political offense exception applied to government agents seeking to suppress an uprising as well as to the participants.[33] In so holding, the court stated that a political offense is "any offense committed in the course of or futhering of civil war, insurrection, or political commotion."[34] This political incidence or disturbance test is still the foundation of the predominant United States definition of the relative political offense. In 1959 dictum, the District Court for the Southern District of California gave the following definition:

> "Generally speaking it is an offense against the government itself or incident to political uprisings. . . . The crime must be incidental to and form a part of political disturbances. It must be in furtherance of one side or another of a bona fide struggle for polical power."[35]

As noted above, judicial opinion in the United States, on the question of what would be appropriate approach, has not always been consistent. Some decisions have appeared to detract from this political disturbance test by hinting that the motivation behind the offense may be considered as a separate test for determining the political character of the offense.[36]

Another objective approach is the so-called <injured rights theory>.[37] France adopted and followed this approach for a period of time. Again, the motive of the perpetrator is not the

focus, but the political character is deduced from the nature of the rights injured.[38] In the absence of any legislative definition of the political offense, we have seen how French jurisprudence has attempted to develop tests to determine when the political offense exemption will be applied. There have been variations and inconsistencies. For example, the decision in the Gatti extradition case[39] rejected the political motivation test and applies a political objective test. This test requires the criminal action to be directed against the political organization of the state. In the Gatti case, the Republic of San Marino sought the extradition of a person accused of attempting to murder a member of a local communist cell. The French court held that the offense was not of a political nature, stating,

> The fact that the reasons of sentiment which prompted the offender to commit the offense belong to the realm of politics does not itself create a political offense. The offense does not derive its political character from the motive of the offender but from the nature of the rights it injures.[40]

Other French decisions have considered the political motivation of the fugitive to be dispositive or at least a factor to be weighed in deciding whether or not the political motive of the offense predominates over the common nature.[41]

Another objective approach is the model of connexity, wherein the common crime is considered a political offense based on its connection to or nexus with a purely political offense.[42] Thus, a person who assists a son, daughter or friend, who happens to be a spy, to escape would fit within the political offense exception.[43]

French legislation illustrates the third general type of political offense when it extends the political offense exception to deny extradition when French officials believe the extradition request was politically motivated. The Extradition Law of 1927 provides that extradition will be denied "when the crime or the offense has a political character or when it results from

circumstances indicating that the extradition is requested with a political purpose."[44]

With regard to offenses relating to insurrections or internal wars (the political incidence approach), article 5(2) of the French Extradition Law of 1927, provides:

> As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furthernace [dans l'interet] of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended.[45]

This provision has been criticized by French commentators[46] because both the commencement and termination of civil war are so difficult to determine in the present era. Moreover, the commentators find a moral flaw in the provision. After a civil war, the people extradited would not necessarily be criminals in the nonpolitical, common crime, sense of that term, but vanquished partisans of a cause.[47] French tribunals have become sensitive to these criticisms and have denied extradition under circumstances that would appear to be covered by the terms of the exception to the political crime exemption described in the article 5(2) of the Extradition Law of 1927.[48] Most of the chambres d'accusations, for example, refused to extradite Spanish Republicans, sought by the Franco regime after the Spanish Civil War, on the ground that their offenses were of a political character.[49]

French extradition treaties are similar to most in the world, in providing for exceptions to the political offense exemption clause. Extradition is allowed, for example, for counterfeiting, even for political ends, and for many forms of terrorism.[50] Thus, the famous clause Belge allows extradition for the murder of the head of state or anyone in his family.[51] Extradition is also allowed for offenses failling within the French term "infraction sociale," which is related to the

"doctrine de gravite." This term represents those offenses directed toward the social organization or structure, rather than the government per se.[52] This approach provides an extremely narrow perception of political offenses and does not generally permit offenses of extreme gravity fit within the political offense exception. These exceptions to the defense are have developed over the years and many have come to be called the "humanitarian exceptions" to the political offense clause. They are consistent with the notion that there are some offenses which will not be allowed to be immunized from extradition. These include the offenses of barbarous or wanton violence and crimes aimed at the civilian population rather than the opposition military, which the Government claims are not subject to extradition.

Thus, the conceptual and theoretical framework for deciding whether or not an act is one of terrorism or whether it fits within the political offense exception is available. Work at development of more efficient or just models or approaches needs to be and is being undertaken, but that is not to say that the courts are incapable of applying the current standards in a manner that will not only assist in the battle against terrorism, but which will maintain the integrity of our constitutional system of checks, balances and the separation of powers. The proposed treaty assumes that the courts are too incompetent or otherwise incapable of deciding questions of law and fact relating to human liberty -- at least to decide these questions in a manner that pleases the Executive Branch. The Government wishes to remove from the judiciary and usurp the quintessential, and constitutional, calling, because the Executive Branch (and the British Government in this instance) have not been happy with the results in some cases. The Senate and the American people should be aware of that reality and understand its implications.

FOOTNOTES

1. A. Sofaer, Statement before the Senate Committee on Foreign Relations, August 1, 1985, at 4.

2. Sofaer, supra note 1, at 3 (emphasis added).

2a. E.g., S.1940, 97th Cong., 2nd Sess., §3194(e)(2) (1982)(Extradition Reform, Part M, of Title X, 1983 CIS S523-19 Senate Rpt 98-225, at 346-350 (1983). 18 U.S.C. §3184(e) makes it clear that offenses which have been made international crimes via international conventions (on hijacking, for example) may not be subject to the political offense exception. Moreover, §3194(e)(2) severely limits the application of the political offense defense in cases of the use of firearms or bombs in a manner that might injure another person . The defense will obtain in such cases only under extraordinary circumstances. Extraordinary circumstances is purposefully left undefined. Id.

3. See Sofaer, supra note 1, at 5.

4. Sofaer, supra note 1, at 5-6.

5. See, Blakesley, A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes, 1984 Utah Law Review 685; Blakesley, United States Jurisdiction Over Extraterritorial Crime, 73 Journal of Criminal Law and Criminology (Northwestern University) 1109 (1982).

6. Id.

7. Blakesley, Extradition and Jurisdiction, supra note 5, at 60, notes 167 and 168.

7a. Talks on Extradition Treaty Soon to begin, The Korean Herald, 26 June 1985, at 1; cited in C. Pyle, Extradition, Political Crimes, and the U.K. Treaty, Statement before the Senate Committee on Foreign Relations, September 18, 1985.

8. Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 102 S.Ct. 390 (1981).

9. Sofaer, supra note 1, at 5.

9a. Treaty of Extradition Between the United States and Italy, arts II, III, and V, U.S. Senate, Treaty Doc. 98-20 (1984). Hostage taking, even when done extraterritorially, was made a federal crime in 1984, "Act for the Prevention and Punishment of the Crime of Hostage Taking, 18 U.S.C. 1203 (1984). It would abe extraditable under the universality principle (piracy) and article II of the Extradition Treaty, which provides that extradition will obtain when the conduct constitutes an offense in both contracting parties and is punishable for one year imprisonment for a more serious penalty.

10. C. Van Den Wijngaert, The Political Offense Exception to Extradition: Defining the Issues and Searching a Feasible Alternative, 1985 Rev. Belge de Droit Int'l. 1 (1985), presented at the International Seminar on Extradition, International Institute of Higher Studies in Criminal Science, Noto, Italy, (June 1983). It is universally accepted in that virtually all extradition law and treaty contains the exception. Id.

11. Statement by Abraham D. Sofaer, Legal Adviser, the Department of State, before the Senate Committee on Foreign Relations, August 1, 1985, at 3, 5 and 6.

12. See generally, C. Van den Wijngaert, supra note 10; J. Murphy, Punishing International Terrorists: The Labors of Sisyphus (1985); Note, Extradition Law: Applicability of the Political Offense Exception, 23 Harv. Int'l. L. J. 124 (1983); Carbonneau, The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created, 1 Am. Soc'y Int'l L.J. 1 (1977); Blakesley, Extradition Between France and the United States: An Exercise in Comparative and International Law, 13 Vanderbilt J. of Transnat'l. L. 653 (1980);

Blakesley, The Practice of Extradition From Antiquity to Modern France and the United States, IV B.C. Int's. & Comp. L. Rev. 39 (1981); See also Travers, La Loi Francaise d'extradition du 10 mars 1927, 54 Journal Du Droit International 595, 600 (1927), for an analysis of the political offense exemption in the French Extradition Law of 1927. Grivaz, L'Extradition et les Delits Politiques (1894); Laire, L'Extradition Et Les Delits Politiques (1911); Solden, L'Extradition Des Criminels Politiques (1992); Deere, Political Offenses in the Law and Practice of Extradition, 27 Am. J. Int'l L. 247 (1933); de Hart, The Extradition of Political Offenders, 2 L.Q. Rev. 177 (1886); Evans, Reflections Upon the Political Offenses in International Practice, 57 Am. J. Int'l L. (1963); Garcia-Mora, Crimes against Humanity and the Principle of Nonextradition of Political Offenders, 62 Mich L. Rev. 927 (1964); Garcia-Mora, The Nature of Political Offenses: A Knotty Problem of Extradition Law, 48 Va. L. Rev. 1226 (1962); Garcia-Mora, Treason, Sedition and Espionage as Political Offenses under the Law of Extradition, 26 U. Pitt. L. Rev. 65 (1964); Deere, Political Offenses and athe Law and Practice of Extradition, 27 Am. J. Int'l. L 247 (1933); Martens, L'extradition pour delits politiques, 11 Revue de Droit International et de Legislation Comparee 44 (1881); Rolin, Du principe de la non-extradition pour delits poliitiques, 24 Revue de Droit International et de Legislation Comparee 17 (1892); Rolin, Les infractions poliques, 15 Revue de droit International 545 (1887); Scott, "Political Offense" in extradition treaties, 3 A.m J. Int'l L. 459 (1909); Weiss, Les crimes et delitis politiques dans les rapports de l'Austriche-Hongrie et de la Russie, 10 Journal du Droit International Prive 247 (1883); Yoshitomi, Extradition de coupables politiques chinois par les

authorities britanniques de Tien=Tsin en novembre 1926, 34 Revue General de Droit International Public 85 (1927). Objectivized definitions of the notion of "political crime" have been attempted by many writers. Some are listed by Schafer, The Political Criminal 10-11, n. 5 (1977).

13. Harvard Research In International Law: Extradition, 29 Am. J. Int'l. L. (Supp 1935); and Garcia-Mora, supra note 12, at 1239, provide some examples. Even purely political offenses have caused wavering on the part of the judiciary during certain periods of time. For example, article 84, para. 3, of the French Penal Code of 1939, and treaties between France and Luxembourg executed at about the same time, provided that for the application of penalties, crimes and dilects against the security of the state would be considered as common crime. This creation hesitation and considerable dispute in French jurisprudence.

During this dispute, certain chambres d'accusations allowed extradition for these offenses, thus abrogating the politcal offense exemption as far as these offenses were concerned. These courts proclaimed the validity of this type of accord and affirmed that, since 1939, offenses against the security of the state had lost their politcal character for all intents and purposes.

Finally, after much dispute, French jurisprudence opted for the opposite view. It was determined that the offense of this order would be considered nonpolitical for purposes of punishment.

The ordonnance du 4 Juin 1960 completely resolved the question when it reinstated the politcal nature of these violations even for purposes of punishment. See discussion in Merle & Vitu, Traite de Droit Criminel: Problems Generaux de la Science Criminelle 333 (2d ed. 1973). Today, France is very careful to apply the political exemption even

in cases of common crimes done for a political purpose. See decision on the extradition of Holder and Kerkow, reported in 1985 Dig. U.S. Prog. Int'l L. 168-75, and discussed at note 19 infra.

14. The German Extradition Law of Dec. 23, 1929, art. 3(2), attempted to define political offenses. It stated that they are:

those punishable offenses . . . which are directed immediately against the existence of the security of the State, against the head or member of the government of the State, as such, against the head or member of the government of the State, as such, against a body provided for by the constitution, against the rights of citizens in electing or voting, or against the good relations with foreign states.

Quoted in Harvard Research, supra note 13, at 385. This definition has been criticized as being both too broad and too narrow, in light of the modern totalitarian states. See S. Schafer, The Political Criminal (1977); Garcia-Mora, The Nature of Political Offenses: A Knotty Problem of Extradition Law, 48 Va. L.Rev. 1226, 1230 (1962).

15. See authority in note 14, supra.

Some scholars have suggested that the term is impossible to define. I Oppenheim-Lauterpacht, Internationsl Law 707-08 (1955); Cf., Hammerich, Rapport general sur la definition du delit politique, in [1938] Actes de la Sixieme Conference Int'l. pour l'Unification du Droit Penal 61; Van den Wijngaert, supra note 10, at 4.

16. C. Van den Wijngaert, supura note 10, citing C. Bassiouni, The Political Offense Exception in Extradition Law and Practice, in Bassiouni (ed.) International Terrorism and Political Crimes 408 (1975).

17. Van den Wijngaert, supra note 10, at 4.

17a. C. Van den Wijngaert, supra note 10, at 5-9.

18. C. Van den Wijngaert, supra note 10, at 5.

19. In re Holder, reprinted in 1975 Dig. U.S. Prac. Int'l L. 168-75. This is the case of an extradition request by the United States for the alleged hijacker of a Western Airlines aircraft from San Francisco to Algeria. Holder was indicted for violation of several Federal criminal statutes arising out of the hijacking of a plane in June 1972, during a domestic commercial flight. Threatening to set off a bomb during flight, the accused allegedly aobtained complete control of the plane. It landed in San Francisco where a replacement flight crew and a second plane were obtained. Holder demanded and received $500,000; some 40 passengers were transferred to the second aircraft, which then flew to New York. That plane refueled in New York, and the passengers disembarked before the flight continued to Algeria.

    The United States extradition request was denied by the Paris Chambre des Mises en Accusation, apparently on the basis of either the fugitive's political motives or the believed risk of aggravated treatment because of his race (a European Extradition Convention criterion, 359 U.N.T.S. 273, art. 3, 15, Int'l. L. Mat. 1272, art 13 (1)(a-c) (1957) Record of extradition request and its denial are in the extradition files of the Office of the Legal Adviser to the Department of State. The legal briefs in opposition to the Holder decision and the diplomatic note protesting it are reported in 1975 Dig. U.S. Prac. Int'l L. 168-75. See also In re Henin, Cours d'appel (Paris 1967), La Semaine Jurisdique 15274.

20. In re Gonzales, 217 F.Supp. 707 (S.D.N.Y. 1963). In approving the extradition to the Dominican Republic of an alleged former agent of the late dictator Trujillo's intelligence apparatus, a United States district court

declared that "nothing in the record ... suggest[s] that Ortiz acted with such essentially political motives or political ends as might justify substantial relaxation of the political disturbance requirement... [T]he political offense principle is inapplicable here. Id.

British cases also have occasionally had a tendency to consider the political motivation of fugitives: see Ex parte Kolczynski, [1955] 2 Q.B. 540, in which extradition ws denied for seven Polish seamen who had revolted aboard ship, wounded a political officer of the Polish Government, and forced the ship into a British port where the crew asked for political asylum. See also, Garcia-Mora, supra note 14, at 1242-43; and Schtraks v. Government of Israel, [1962] All E.R. 529 (House of Lords), in which the Government of Israel had sought the extradition of an Israeli national who had helped his parents in refusing to surrender a child left with them temporarily, because they feared the child would not be given a religious education. Extradition was granted.

21. Sofaer, supra note 1, at 3,5,6.

22. In re Gonzales, supra note 20.

23. The test was developed in a series of cases, the most important of which are: In re Vogt, 2 Ann. Dig. 285 (Tribunal federale, Switz., 1924); In re Kaphengst, 5 Ann. Dig. 292 (Tribunal federale, Switz., 1924); In re Kaphengst, 5 Ann. Dig. 292 (Tribunal Federale, Suisse, 1930); In re Ockert, 19 I.L.R. 369 (Tribunal federale, switz., 1951). See also, Della Savia Case, 25 Nov. 1968, 95 A.T.F., I, at 462 (Trib. Fed. Suiss, 1968); Morlacchi Case, 12 Dec. 1975, 101 A.T.F., Ia., at 605 (Fed. Trib. Suisse, 1975); Castori Case, 19 March 1975, 101 A.T.F., Ia, at 65 (Fed. Trib. Suisse, 1975); Van den Wijngaert, supra note 10, at 8.

24. Id. at 370.

25. In re Kavic, Bjelanovic & MArsenijevic, 19 I.L.R. 371 (Tribunal federale, Switz., 1952).

26. Ktir v. Ministere Public Federal, 34 I.L.R. 143 (Tribunal federale, Switz., 1961).

27. Id. at 145.

28. Id. at 144. For a thorough analysis of the Swiss predominance test, see Carbonneau, supra note 12.

See also, McCann Case, Court of Appeal, Aix-en-Provence, 14 April 1975, unpublished, English translation by Carbonneau, 1983 Mich. YrBk Int'l. L. S. 341 (1983); Da Palma Case, Court of Appeal, Paris, 14 Dec. 1967, La Semaine Juridique, No. 15387 (1968).

28a. C. Van den Wijngaert, supra note 10, at 8.

29. In re Castioni, 1 Q.B. 149 (1891).

30. In re Castioni, 1 Q.B. 149, 166 (1891).

31. Van den Wijngaert, supra note 10 at 5.

32. Van den Wijngaert, supra note 10, at 6. Shearer, Extradition in International Law 178 et seq (1971); Bassiouni, International Extradition in United States Law and Practice, VIII, §2 (1983). See the political incidence theory's application in the Mackin case, 668 F. 2d 122 (2nd Cir 1981); Sindona v. Grant, 619 F. 2d 167 (2nd Cir (19); Cf. Matter of McMullen, Mag. No. 3-78-1099 MG (N.D. Cal. 1979), 74 Am. J. Int'l. L. 434 (1980); Eain v Wilkes, 641 F.2d 504 (7th Cir.) cert. denied 102 S Ct 390 (1981); Budlong and Kember, Queen's Bench, U.K., [1980] All E.R. 714 (1980).

33. In re Ezeta, 62 F. 972 (N.D. Cal. 1894).

34. Id. at 998.

35. Karadzole v. Artukovic, 170 F.Supp. 383 (S.D. Cal. 1959). Here a Yugoslav extradition request for a man charged with murdering a Croatian government official during World War II was denied on the basis of insufficient evidence. After determining that the evidence was insufficient, the court

considered the political offense question, and offered its dictum that the offense, if committed as alleged, would be political. Subsequently, this fugitive was found to have been a participant in Nazi war crimes and has been found extraditable. Matter of Artukovic, Case No. CV84-8743-R (B), (C.D. Cal., 1984), cited in C. Pyle, Extradition, Political crimes and the U.K. Treaty, Statement before the Senate Committee on Foreign Relations, September 18, 1985, at 36.

36. In re Gonzales, 217 F. Supp. 717 (S.D.N.Y. 1963); discussed in detail above at notes 18-22, and accompanying text.

37. Van den Wijngaert, supra note 10 at 5.

38. Id.; In re Giovanni Gatti, Jdt. of Jan. 13, 1947, Ct. of Appeal, Grenoble, Rec. Sirey, II, at 44 (1947), 1947 Ann. Dig. 145 (No. 70, France). This theory was incoked frequently by Belgium in seeking the extradition of World War II collaborators.

39. Judgment of Jan. 13, 197, (Cour d'appel). 1947 Ann. Dig. 145 (no. 70, France).

40. Id. at 145-46. The French Court of Appeal also stated: "We can only demand that the motive which inspired the agent should not be considered an aggravation of the offense, and that the extradited person should not be tried by an extraordinary tribunal." Id. at 146.

41. In re Holder, reprinted in 1975 Dig. U.S. Prag. Int'l L. 168-75, discussed at note 19, supra.

42. Van den Wijngaert, supra note 10, at 5.

43. Id. Bourke v. Attorney General, 107 Irish Law Times at 296 (1973).

44. Extradition Law of March 10, 1927, La Loi Relative a l'Extradition des Etrangers [1927] D.P. IV, art 5(2), reprinted in Code de Proc. Penal, after art. 696 (Dalloz 1984) (emphasis added). The European Convention on Extradition, 359 U.N.T.S. 273 (1957), article 3, goes beyond

both the Extradition Law of 1927 and the United States -- French Extradition Treaty by providing that extradition will be denied: when the offense is of a political nature; when it is connected to other political offenses; or when the requested state has reason to believe that the request is presented with a view to punish the fugitive for considerations of race, religion, or nationality, or for his political opinions. It even provides for refusal to extradition when the requestd state has reason to believe that the accused's treatment by the requesting state risks being aggravated because of his race, religion, nationality or political opinion. See generally Schultz, La Convention Europeenne d'Extradition et le Delit Politique, Melanges Constant 313 (1971). Cf., European Convention on Terrorism, European Treaty Series, No. 90, art. 1(e) (1977). The Convention on Terrorism does exclude certain offenses from coverage of the political offense exception, the use of a bomb, grenade, rocket automatic firearm or letter or parcel bomb, if the use endangers persons, but allows the parties to the Convention to reserve the right "to refuse extradition in respect of any offense mentioned in Article I which it considers to be a political offense", as long as the reserving state promises that, when it makes such a decision in individual cases, it will take due account of three factors: the "collective danger to the life, physical integrity or liberty of persons" or, that the crime "affected persons foreign to the motives behind it," or that "cruel or vicious means have [or have not] been used" in its commission. European Convention, supra this note, 15 Int'l L. Mat. 1272, art 13 (1)(a-c); cited and noted in Pyle, Statement, supra note 35, at 29. Certainly, the European Convention does not eliminate the authority of the parties'

judicial branch from making the difficult decision or, worse, to use their courts as an arm of the foreign victor in a civil conflict to punish its opponents. Id.

45. Extradition Law of 1927, supra note 44, art. 5(2),-para. 2 (emphasis added).

46. See, e.g., Merle & Vitu, Traite de Droit Criminel: Problems Generaux de la Science Criminelle, at 334 n. 1 (2d ed. 1973); and Donnedieu de Vabres, Le Regime Nouveau de l'Extradition d'apres la Loi du 10 Mars 1927, 1927 Rev. Critique de la Legislation et de la Jurisprudence 503; Donnedieu de Vabres, Traite Elementaire de Droit Criminel at No. 1795 (2d ed 1943).

47. See authorities in note 46, supra. One commentator in the United States believes that the vanquished "heroes" of a civil conflict are, by definition, political criminals. They would thus not be extraditable, although the "mere followrs" or partisans are not "heroes" and hence, when they fail they are not real political criminals; if this were a legal defiition,, they would be extraditable. See Schafer, supra note 12. Obviously, this is not a legal definition.

48. Extradition Law of 1927, supra note 44.

49. Judgment of June 6, 1941, G.P. 1953.2.113 (Toulouse); but see Judgment of October 19, 1941, G.P. 1942.1.16 (Alger), in which extradition was allowed although it was for offenses related to civil war.

50. Merle & Vitu, supra note 46 at 333.

51. This is also called the "assassination clause" ("clause d'attentat").

52. See Merle & Vitu, supra note 46, at 334. This is quite similar to what the Third Reich developed and several socialist regimes have frankly espoused; the ideology-directed social defense, perhaps, recognizes crimes as being

political, yet punishable because they are attacks against the "supreme ideology." Thus, the social danger of "anarchy" makes it a punishable "non-political" crime in France and a punishable "political crime" in the Soviet Union. Indeed, the essence of any crime in German and Soviet criminal law is its "social dangerousness." G. Fletcher, Rethinking Crimnal Law 864, § 10.5 (1978). See Schafer, supra note 12, at 1.

STATEMENT OF JOHN FRANCIS MURPHY

Professor MURPHY. Thank you very much, Mr. Chairman.

In the brief time allotted, I would like to focus on three questions.

One, is this treaty a significant step forward toward combating terrorism?

Two, does the political offense exception as applied by U.S. courts make any sense?

And, three, should the treaty be ratified and should it be ratified with reservations?

With respect to my first question, is this a significant step forward toward combating terrorism, with the greatest of respect to Judge Sofaer, I believe it is not. I believe, in fact that this treaty has very little to do with terrorism. Terrorism is a vague and probably undefinable term, but with the exception of the *Quinn* case, I believe the four cases did not involve terrorist activities carried on in Northern Ireland.

Mr. Quinn, remember, set off some bombs in public places and one might define that as terrorism. Mr. Doherty, by contrast, attacked a British soldier in Northern Ireland. I would say that is not terrorism. I hasten to add, however, that it may be regarded as criminal activity. It is certainly regarded as criminal activity by the British under British law and the question is, should it be regarded as murder under our extradition treaty with the United Kingdom?

The courts, in the four cases mentioned, have decided that no, that will not be regarded as murder because it is a political offense. What is the test that these courts have applied in making this determination?

The test is something called the political incidence test, and I would submit to you that the political incidence test does not make any sense. It does not make any sense from a human rights perspective and it does not make any sense from the perspective of other policy considerations underlying the political offense exception.

The political incidence test holds—and the *Doherty* case is the classic example here—that if a violent act, for example, an attack

on a British soldier, is incidental to and part of a political disturbance, then that will be regarded as a political offense, even in a situation where, as I believe is the case here, the law of armed conflict does not apply, so the individual would not be allowed a combatant's privilege.

The incidence test raises a sort of automatic presumption of victors' justice, which I think is an issue that has to be determined. So, in my opinion, the political offense test as applied by the U.S. courts, and to a great extent, by the British courts, does not make much sense.

Are there problems with this particular treaty? Yes; I believe that there are, although I favor ratification with certain reservations, which are spelled out in more detail in my statement.

A major problem with this treaty revolves around the issue of whether these IRA individuals can get justice in Northern Ireland courts.

It seems to me that there are two aspects of this issue. One, can they get it now? If they cannot get it now, then this treaty certainly should not be ratified. I think that the Senate has to make this decision.

The second question is, what might happen in the future and who decides then whether the request is politically motivated or if the courts give justice in Northern Ireland?

I believe these decisions should be made by the courts—I would favor a reservation explicitly giving this decisionmaking power to the courts—because with all due respect to the executive branch, there is simply no way that, as a political matter, the State Department is ever going to decide not to extradite somebody to the United Kingdom on the grounds that he cannot get a fair trial there. So, I favor such a reservation, which admittedly is contrary to current practice. I also favor inclusion of such a change in legislation reforming extradition laws, and indeed, I would hope that Congress would return as a matter of high priority to the reform of extradition laws, because that would be a major step forward in combating terrorists.

Finally, I would favor a reservation to this treaty that would allow the courts to make a determination as to whether the law of armed conflict applied, using tests that are established under the conventions regarding the law of armed conflict.

If the law of armed conflict applied, the accused would have a combatant's privilege to attack military targets, including, of course, British soldiers. I believe it does not apply at this point, and I would rather suspect that it would never apply, but this decision should be made by the courts.

Incidentally, if the law of armed conflict applied, people like Mr. Doherty would not be set free; rather the obligation on the United States would be to intern Mr. Doherty for the duration of the conflict in Northern Ireland, which I think is something that he would not be very happy with.

So, I believe that the court was wrong in determining that Mr. Doherty's crime was a political offense. The judge in the *Doherty* case found that the courts in Northern Ireland did afford a fair trial. The law of armed conflict, in my opinion, does not apply in

Northern Ireland at this point, and therefore Mr. Doherty should have been extradited.

This treaty, however, turns all of those decisions over to the executive branch and I am opposed to that, so I believe that these reservations are necessary.

Thank you, Mr. Chairman.

Senator HATCH. I will be happy to put your full statement in the record.

[Prepared statement follows:]

PREPARED STATEMENT OF JOHN F. MURPHY

Mr. Chairman and Members of the Subcommittee:

It is a privilege and a pleasure to testify before you on the United States-United Kingdom Supplementary Extradition Treaty (hereinafter "Supplementary Treaty"). Many issues have been raised, and the debate on them has been fierce, in hearings held before the Senate Committee on Foreign Relations in August, September, and October of this year. I will discuss some of these issues in my statement. At the outset, however, I should state that I favor the Senate giving its advice and consent to ratification of this treaty, but only if serious previously raised challenges to ratification can be met to the satisfaction of the Senate and only if the Senate insists that two reservations to the treaty be included as part of the instrument of ratification.

Moreover, although I agree with the executive branch that individuals who kill British soldiers or policemen in Northern Ireland should not be able to avail themselves of the political offense exception to extradition contained in Article V of the 1972 United States-United Kingdom Extradition Treaty, I do so for reasons that differ in significant aspects from those advanced by the executive branch in the August 1985 hearings before the Senate Committee on Foreign Relations. In particular, as I will explain more fully later in this statement, I do not believe that this is an issue of "international terrorism" or that the Supplementary Treaty is a major antiterrorism initiative designed to prevent the United States from becoming a haven for international terrorists.

BRIEF BACKGROUND TO SUPPLEMENTARY TREATY

The background to the Supplementary Treaty includes, most importantly, four United States cases that involved persons who

had committed acts of violence in the United Kingdom and Northern Ireland and who were sought for extradition by the United Kingdom. In all four of these cases the decision of the court was to deny extradition on the ground that the offense charged constituted a political offense. A brief consideration of the facts and holding of these cases is instructive.

In In re McMullen, Magistrate Decision No. 3-78-1099 M. G. at 3 (N.D. Calif., May 11, 1979) (unreported), the alleged offender was a deserter from the British army who had joined the Provisional Wing of the Irish Republic Army (PIRA). He was charged with participating in the bombing of the Claro Barracks in Great Britain, which resulted in the death of a charwoman. When he was apprehended in the United States, Great Britain sought his extradition pursuant to the provisions of the United States-United Kingdom Extradition Treaty. At his hearing, McMullen alleged that Great Britain was seeking his extradition for a political offense. The magistrate agreed. In so ruling he found that "an insurrection and a disruptive uprising of a political nature did, in fact, existed [sic] in Northern Ireland in 1970 and particularly in 1974, when Mr. McMullen is charged with the crimes against Caro Barracks, a British army installation" and that McMullen had "acted as a member of PIRA. His activities were directed by...the PIRA and...the bombing was a crime incidental to and formed part of a political disturbance, uprising or insurrection and in furtherance thereof."

The United States magistrate for the Southern District of New York, in In re Mackin, Mag. No. 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981) (unreported), took 101 pages to determine that Mr. Mackin's alleged shooting of a British policeman in Northern Ireland constituted a political offense within the meaning of the United States-United Kingdom Extradition Treaty, and that his extradition was therefore barred. The government sought to convince the

United States Court of Appeals for the Second Circuit that it had jurisdiction to review the magistrate's decision, but the court declined to accept the appeal. In re Mackin, 668 F.2d 122 (2d Cir. 1981).

Similarly, on October 3, 1983, the United States District Court for the Northern District of California in Quinn v. Robinson C-82-6688 R.P.A. (N.D. Cal. Oct. 1983) (unreported), ordered the release from jail of William Joseph Quinn, an alleged Irish Republican Army member accused of shooting a London police constable to death in 1975, and conspiring to send letter bombs to a Catholic bishop, a British judge and a newspaper executive. Explosives were placed at a railroad station and two restaurants; two of the bombs exploded, causing serious injuries. The court ruled that all of these alleged crimes constituted political offenses. The case is currently on appeal to the United States Court of Appeals for the Ninth Circuit.

It should be noted parenthetically at this point that the court's decision to classify as political offenses Quinn's sending of letter bombs and his involvement in the planting of bombs is surprising. Even during times of armed conflict governed by the laws of war, the deliberate targeting of civilians constitutes a crime subject to prosecution and punishment. That the violence directed against the general civilian population was incidental "to the political goals of seeking an end to British rule in Northern Ireland," a factor cited by the court in support of its decision, would not excuse a crime under the law of armed conflict.

Most recently, in this line of cases involving members of the Provisional Irish Republican Army, John E. Sprizzo, District Judge for the Southern District of New York, in In re Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984), denied a request to extradite Joseph

Patrick Thomas Doherty to the United Kingdom. Mr. Doherty did not deny that he had been involved in a PIRA attack in Northern Ireland on a convoy of British soldiers; that this attack resulted in the death of a British soldier; that he had been arrested, charged with murder, among other crimes, and held in a prison in Northern Ireland pending trial; that after trial was completed but before any decision by the court, he escaped from prison; that he was convicted in absentia of murder, attempted murder, illegal possession of firearms and ammunition, and belonging to the Irish Republican Army; and that following his arrest in New York City, the British Government had filed a formal request for his extradition on August 16, 1983. Doherty claimed, however, that his extradition should be denied on the ground that the offenses for which extradition was requested constituted political offenses.

The District Court upheld Mr. Doherty's contention. In Judge Sprizzo's view, "the facts of this case present the assertion of the political offense exception in its most classic form. The death of Captain Westnacott, while a most tragic event, occurred in the context of an attempted ambush of a British army patrol. It was the British army's response to that action that gave rise to Captain Westnacott's death. Had this conduct occurred during the course of more traditional military hostilities, there could be little doubt that it would fall within the political offense exception." Judge Sprizzo went on to hold that, while "it would be most unusual as a matter of policy to extend the benefit of the political offense exception to every fanatic group or individual with loosely defined political objectives who commit acts of violence in the name of those so-called political objectives," the PIRA has "an organization, discipline, and command structure that distinguish it from more amorphous groups such as the Black Liberation Army or the Red Brigade." Moreover, Judge Sprizzo declined to "make the political exception concept turn upon the court's assessment of the likelihood of a movement's success.

History is replete with examples of political and insurrectionary movements that have succeeded in effecting political changes that were believed to be improbable if not impossible."

Interestingly, by way of dicta, Judge Sprizzo distinguished Doherty's case from situations where the political offense situation would not apply. For example, he noted that the Court was not faced with a situation "in which a bomb was detonated in a department store, public tavern, or a resort hotel, causing indiscriminate personal injury, death, and property damage." Nor was this "a case where violence was directed against civilian representatives of the government, where defining the limits of the political offense exception would be far less clear;" or "a case where the alleged political conduct was committed in a place other than the territory where political change was to be effected, a circumstance that would in all probability render the political offense exception inapplicable." Finally, the court was "not presented with facts which establish that hostages were killed or injured or where the principles embodied in the Geneva Convention have clearly been violated."

The United States Government reacted strongly to the magistrates' decision in the McMullen and Mackin cases that IRA members had committed political offenses by bombing British military barracks in England and shooting a British policeman in Northern Ireland. Having failed to convince the courts that the current law reserved the decision on the political offense exception to the executive branch, the government sought to accomplish such a reservation by including in newly concluded bilateral extradition treaties specific provisions reserving to the "Executive authority of the requested party" the power to determine whether an offense for which extradition is requested falls within the political offense exception. More generally, the executive branch prompted introduction of draft legislation in the

Senate that would, inter alia, have granted both the government and the accused the right to appeal a district court or magistrate's decision, on various issues of extradition law, but reserve to the sole discretion of the Secretary of State the decision whether the political offense is applicable.

Senate hearings on the draft legislation revealed general agreement on the provision granting both the government and the accused the right of appeal, as well as on a number of other changes in current extradition law the draft legislation would have effected. There was, however, substantial opposition to transferring the decision making authority from the courts to the Secretary of State. It was argued that exclusion of the judiciary from the decision making process would undermine the purpose of the political offense doctrine to protect individuals from government oppression and subject the doctrine to the political calculations of governments.

These and other arguments prevailed, and later bills introduced in Congress retained for the courts decision making authority over the political offense exception, subject to certain legislatively mandated exceptions. The various bills and the arguments pro and con on them have been described in Bassiouni, "Extradition Reform Legislation in the United States: 1981-1983," 17 Akron L. Rev. 495-574 (1984). At this writing the effort to reform the extradition laws of the United States appears to have ceased. This is unfortunate, and I will return to this point later in this statement.

The Supplementary Treaty, then, is the latest effort to deal with the inability of the executive branch to secure the extradition of IRA members accused of murder and other crimes to Great Britain.

THE SUPPLEMENTARY TREATY, INTERNATIONAL TERRORISM, AND THE POLITICAL OFFENSE EXCEPTION

Before considering the Supplementary Treaty and the political offense exception, it is useful to consider the claim made by the executive branch that the treaty represents a significant step in the effort to combat international terrorism. With respect I believe this is incorrect.

"Terrorism" is a term of uncertain legal content. The late Richard Baxter, Professor of International Law at Harvard University and United States Judge on the International Court of Justice, was particularly dubious regarding the desirability and necessity of defining the term. In his view, "We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose." Baxter, "A Skeptical Look at the Concept of Terrorism," 7 Akron L. Rev. 380 (1974).

At the international level, in particular, there is no agreed upon definition of "terrorism" and hence no international crime of terrorism. Rather, there are treaty provisions for suppression of aircraft hijacking, unlawful acts against the safety of civil aviation, unlawful acts against internationally protected persons including diplomatic agents, the taking of hostages and the theft of nuclear materials. Although these treaty provisions are often loosely described as "antiterrorist," the acts they cover are criminalized regardless of whether they, in any particular case, could be classified as "terrorism." Similarly, under national law, penal provisions with respect to murder, assault, theft, illegal detention of persons, taking of hostages, arson, etc., are normally the basis for prosecution of "terrorist" acts, although they usually contain no reference to terrorism and are applicable notwithstanding the absence of a terror outcome. To be sure, some

countries have adopted antiterrorist statutes, but these are exceptions to the norm and are themselves highly controversial.

Besides being "imprecise," "ambiguous" and serving no "operative legal purpose," the term terrorism is emotionally charged, as demonstrated by the cliché, "One man's terrorism is another man's heroism." Some countries believe that the causes of terrorism or the political motivation of the individual terrorist are relevant to the problem of definition. For example, the position of some governments has been that individual acts of violence can be defined as terrorism only if they are employed solely for personal gain or caprice; acts committed in connection with a political cause, especially against colonialism and for national liberation, fall without the definition and constitute legitimate measures of self-defense. Under this approach, then, the sending of letter bombs through the mails, hijacking of airplanes, kidnappings of or attacks on diplomats and international business persons, and the indiscriminate slaughter of civilians by members of revolutionary groups could never constitute "terrorism" if committed on behalf of a just cause.

In international forums, the United States has attempted to combat this line of argument by denying any attempt to classify as terrorism attacks by liberation groups on military targets. The Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, introduced by the United States in the General Assembly in 1972 in response to the murder of the Israeli Olympic competitors at Munich, Germany, would have expressly excluded from its coverage attacks by or against a member of the armed forces of a state in the course of military hostilities. The attempt then and since has been to induce countries to agree that certain acts, such as the deliberate targeting of the civilian population, are so heinous that they should be regarded as criminal acts no matter how just the cause of the perpetrators.

A similar approach has recently been recommended by the International Law Association, a prestigious group of private international lawyers, which would have acts of international terrorism include but not be limited to "atrocities, wanton killing, hostage taking, hijacking, extortion or torture committed or threatened to be committed whether in peacetime or in wartime for political purposes provided that an international element is involved."

Under this more circumscribed approach, the killing by Mr. Doherty of a British soldier in a fire fight in Northern Ireland would not be classified as "terrorism." By contrast, the actions of Mr. Quinn, in sending letter bombs and planting bombs in public places, could arguably be classified as terrorism. The crucial question, however, is not whether Mr. Doherty committed a terrorist act. It is rather whether his killing of a British soldier should be regarded as murder for purposes of the United States-United Kingdom Extradition Treaty, or whether, in effect, he should be regarded as having a license to kill British soldiers in Northern Ireland, at least as far as any United States obligation to extradite under the treaty is concerned. To answer this question, we need to take a closer look at the political offense doctrine.

Like terrorism, the term "political offense" has not been defined by the international community. Moreover, it is probably undefinable. In the words of Sir Hersh Lauterpacht: "Up to the present day, all attempts to formulate a satisfactory conception of the term [political offense] have failed, and the reason of the thing will probably forever exclude the possibility of finding a satisfactory definition." 1 L. OPPENHEIM, INTERNATIONAL LAW 707-708 (8th ed., Lauterpacht, 1955).

Dr. Christine Van den Wijngaert has identified three rationales for the political offense exception reflecting in turn three interests involved in the extradition process: those of the

accused, the states concerned (requesting and requested state), and international public order. C. VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 2 (1980). Under the first rationale, the political offense exception has a humanitarian basis and is viewed as protection against an unfair trial in the requesting state, which, as the target of the political crime, might be inclined to function as both judge and jury.

The second rationale is based on the principle of neutrality. According to this theory, an inquiry into the extraditability of a political crime would imply a judgment with respect to a political conflict situation in the requesting state. The rendering of such a judgment could in turn amount to the taking of a position with respect to this conflict that would be interpreted as an intervention in the internal affairs of the requesting state. Accordingly, the requested state is well advised to refuse extradition of political offenders a priori. Along the same lines, it is contended, "Today's political offenders could be tomorrow's leaders."

Under the third rationale, it is assumed that political crimes do not violate international public order and that states accordingly have no mutual interest in the suppression of such crimes, which have only a local character because they are directed against the domestic public order of the requesting state. Moreover, this rationale holds that international penal cooperation with respect to political crimes is less required tha with respect to common offenses because political crimes are less heinous in character. That is, contrary to common crime, political crimes are not inherently "criminal" because the perpetrator acts not according to personal motives but for the benefit of society as a whole.

Dr. Van den Wijngaert has criticized these rationales as follows:

> The reasons advanced in support of the political offense exception are not as logical as they may seem on the surface. Are political offenders always likely to be subject to an unfair and partial trial? Is the nonextradition of political offenders always to be considered as an act of neutrality, or on the contrary, is it an effective support to political adversaries of the requested state? And finally, is the relative antisocial character of political crimes to be taken for granted?...Id. at 4.

From an historical perspective, the political offense exception was a late development. Early extradition practice regarded the surrender of political offenders as a primary goal. Sovereigns were directly interested in the suppression of crimes directed against the state and were inclined to pursue prosecutions abroad and collaborate with other sovereigns to ensure that they would be able to prosecute political offenders. As a consequence, political offenders were usually extradited.

A marked change in this antipolitical crime attitude took place in the Eighteenth Century with the rise of revolutionary ideology. This attitude carried over to the Nineteenth Century and found expression in the Belgian Extradition Act of 1883. By this act, Belgium adopted the so-called "attentat" clause approach that an attack against the person of a foreign head of state or against the person of a foreign head of state's family member were never to be defined as political offenses. This Act also introduced for the first time a limited form of judicial control over extradition. After passage of the Act, courts could give advisory opinions on whether an accused was extraditable, although these were not binding and could be rejected by the executive.

Dr. Van den Wijngaert has suggested that, during the Eighteenth Century, there was a romantic glorification of

political offenders. This was based on a "naive" identification of political offenders with the liberal revolutionary. Those supporting this concept did not realize that the political offender might eventually attack the new liberal legal order itself. During the last half of the Nineteenth Century, the rise of anarchist revolutionaries posed a serious threat to precisely this legal order.

In practice, states have defined the term "political offense" unilaterally, usually through their judiciaries. While doing so, the courts have had little difficulty in concluding that so-called pure political offenses, such as sedition, treason, or unlawful political advocacy should be excluded from extradition. As a consequence, there have been relatively few court cases concerned with pure political offenses.

No such ease of determination has been present with respect to what have come to be called "relative political offenses," under which perpetrators of certain acts that have elements of common crimes, such as killing or infliction of serious bodily injury, were nonetheless deemed worthy or exclusion from the extradition process because their acts were considered political offenses. As to these offenses, there has been little uniformity of approach among the courts in various nations, and this lack of uniformity and consistency has often been present as well in a single jurisdiction.

As reflected in the cases discussed above, the approach to the political offense exception adopted by United States courts is the so-called "political incidence theory." Under this theory, as developed by British and American case law, a relative political offense is one committed in the course of a political disturbance and "incidental to" and part of the political disturbance. As Judge Sprizzo stated, the facts of the Doherty case "present the

assertion of the political offense exception in its most classic form," and, I would assert, Judge Sprizzo's opinion in the Doherty case is a classic example of the application of the political incidence theory. The result was that the court barred Doherty's extradition to Great Britain. The question, again, is whether this decision is sound as a matter of law and policy.

It certainly is sound if, as alleged, Mr. Doherty would not be able to get a fair trial in the courts of Northern Ireland. In his opinion, Judge Sprizzo explicitly rejected this contention. I have no personal expertise on this issue, but would suggest that the Senate should make its own independent determination. I will return to humanitarian considerations later in this statement.

In any event, the basis for the political incidence test would not seem to be humanitarian considerations, unless one assumes, contrary to fact, that, by definition, rebels are fighting to further fundamental human rights or that they necessarily will be subject to "victors' justice." Rather, the policy consideration underlying the political incidence theory would seem to be the principle of neutrality. But the principle of neutrality should not be applied to Northern Ireland unless Mr. Doherty had a combatant's privilege to kill British soldiers and to attack other military targets in Northern Ireland. This is not the case. Under Article 1(2) of the 1977 Protocol II to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), which although not yet in force as a treaty is the most authoritative statement of law on the subject, international legal norms regulating non-international armed conflict do not apply to situations of internal disturbance and tension such as riots, isolated and sporadic acts of violence and other acts of a similar nature. Indeed, under Article 1 the coverage of Protocol II is limited to "armed conflicts...which take place in the

territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." No such armed conflict is now taking place in Northern Ireland.

The effect of a broad application of the combatants' privilege is to make the military and perhaps police officers "fair game" for self-styled revolutionaries. The suggestion that the life of a military person or a police officer is worth less than that of other persons is morally repugnant.

American Bar Association policy with respect to legislative proposals relevant to the political offense exception to extradition was expressed in Report No. 104A, approved by the House of Delegates in August 1983. In relevant part the ABA strongly recommended that such legislation:

> (b) Exclude all acts of terrorist violence from the application of the political offense exception, particularly those denounced by multilateral conventions to prevent and punish acts of international terrorism.
>
> (c) Preclude the application of the political offense exception from offenses which constitute serious breaches of the norms established under international humanitarian law applicable in international and non-international armed conflicts, without subjecting to extradition combatants for warlike acts which do not transgress those norms.

Similarly a draft resolution of the American Bar Association:

> Recommends that the ratification of the Supplemental Extradition Treaty be subject to:
>
> a. a reservation of the right to consider as a political offense any act listed under subsections (e) to (k) of Article I if the Act was committed in the course of a non-international armed conflict in furtherance of the objectives of the party to the conflict to which the person belongs and which does

not violate the norms of international law applicable in non-international armed conflicts; and

b. a declaration that it is the understanding of the United States that the term "armed conflict" does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

I would favor such a reservation and declaration. By adopting them the Senate would enable the courts to ensure that those persons charged with murder under British law would be extradited to the United Kingdom (assuming arguendo the fairness of British courts). At the same time, should the situation change in Northern Ireland so that combatants' privileges should be extended to the Irish Republican Army, the courts would be able to make such a determination and deny extradition. I emphasize that I believe this decision should be made by the courts, not by the executive branch.

Some have argued that, even if the law of armed conflict does not grant IRA fighters in Northern Ireland combatants' privileges, the United States should remain neutral with respect to the conflict and decline to extradite IRA fighters who reach these shores. One response to this contention is that, by refusing to extradite IRA members charged with attacks on British soldiers, the United States, far from being neutral, is helping the IRA by providing sanctuary. Another is that, by extraditing IRA members charged with such attacks, the United States remains neutral with respect to the issue whether Northern Ireland should remain part of the United Kingdom. It would take a stand, however, that the issue should be resolved by peaceful rather than violent means in a democratic country like the United Kingdom.

THE SUPPLEMENTARY TREATY, HUMANITARIAN CONSIDERATIONS, AND THE CONSTITUTION

As noted above, some have contended that IRA members currently cannot obtain a fair trial in Northern Ireland.

Assuming this contention is incorrect, a year or two in the future, the situation could change. If so, under the Supplementary Treaty, any decision to decline extradition would lie in the sole discretion of the executive branch. To be sure this would be in keeping with the current extradition law of the United States, which does not expressly recognize a bar to extradition even if the accused would be persecuted in the requesting state on account of race, religion or political opinion or if there is evidence that the court system in the requesting country fails to meet minimal standards of due process. Rather, under the rule of non-inquiry adopted by United States courts, the executive branch may, in its sole discretion, decide whether to extradite under such circumstances.

Most U.S. extradition treaties provide that extradition shall be denied if the true purpose of the request is to persecute the person sought for his political opinion, race, religion, or nationality. Nonetheless, although compatibility with treaty requirements is one of the issues within their jurisdiction, the courts have consistently declined to inquire into the foreign government's motives for seeking extradition, or the fairness of its judicial system.

On the face of it, this is an anomaly, since deportation of a person to such a country is expressly prohibited by United States law and the courts enforce this prohibition. Moreover, it is highly debatable whether the judiciary should defer to the executive branch in cases involving claims of political persecution upon return. Without intending to impugn the integrity of good faith of officials in the executive branch, it is simply inconceivable that, as a political matter, the Department of State would decline to extradite a person to the United Kingdom on the ground that he was being sought for purposes of persecution or that he could not get a fair trial in British courts.

On October 4, 1983, the House Judiciary Committee adopted an amendment to H.R., 3347, a bill that would have revised the extradition laws of the United States, which would have abolished the rule of non-inquiry and substituted an affirmative obligation to inquire into the treatment a returned accused would be likely to receive. Specifically, the so-called Kastenmeier Amendment, introduced by Congressman Robert Kastenmeier, would have prohibited extradition of an accused if that "person has established by a preponderance of the evidence that he: (i) is being sought for prosecution or punishment because of such person's race, religion, sex, nationality, membership in a particular social group or political opinion; (ii) would, as a result of extradition, be subject to fundamental unfairness."

The executive branch opposed this provision, and Congress has adopted no legislation reforming United States extradition law. Moreover, the executive branch has indicated that it has no current interest in pursuing the adoption of such legislation.

To return to the Kastenmeier Amendment and the issue whether the executive branch or the courts should decide whether humanitarian considerations preclude the extradition of a person sought for extradition under the Supplementary Treaty, I strongly favor this determination being made by the courts, especially with the situation in Northern Ireland as fluid as it is. In his written statement submitted to the Senate Committee on Foreign Relations on September 18, 1985, at pages 35-40, Professor Christopher Pyle has convincingly set forth the reasons favoring the courts making this decision. He notes, among other things, that the European Convention on the Suppression of Terrorism (Article 5) and the European Convention on Extradition (Article 3) contain language similar to the Kastenmeier Amendment; that the principle expressed in the Amendment has been adopted by legislation or court decisions in such countries as the United

Kingdom, Israel and the Federal Republic of Germany; that the principle is also reflected in The United Nations Convention relating to the Status of Refugees, and in the U.S. Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C. 1253, Section 243(h)(1), which places limits on the discretion of the Attorney General to deport or return an alien and subjects his decision to judicial review; and that U.S. courts have not strictly adhered to the rule of non-inquiry, with Judge Sprizzo's dicta in the Doherty case that British courts in Northern Ireland are fair being one prominent example.

Accordingly, I favor a reservation to the Supplementary Treaty along the lines of the Kastenmeier Amendment. Such a reservation might read:

> The United States reserves the right to refuse extradition if a person has established before the competent judicial authority and by a preponderance of the evidence that he: (i) is being sought for prosecution or punishment because of his race, religion, sex, nationality, membership in a particular social group or political opinion or (ii) would, as a result of extradition, be subjected to fundamental unfairness.

It is important to note how Professor Pyle and I differ in our view of the Supplementary Treaty. Since he would retain the political offense exception to extradition in the treaty, under Pyle's approach Mr. Doherty would not be extradited to the United Kingdom because his actions clearly fell within the political incidence test employed by United States courts. This would be so even though Judge Sprizzo explicitly found Doherty could receive a fair trial in British courts in Northern Ireland, and Doherty does not enjoy a combatant's privilege in the disturbances there.

By contrast I believe that Mr. Doherty should have been extradited because the political incidence test is an unsound standard and his extradition would not be precluded by humanitarian considerations (assuming the correctness of Judge

Sprizzo's decision) and because he did not enjoy a combatant's privilege.

Professor Pyle defends retention of the political offense exception in the Supplementary Treaty on the following grounds:

> As crude as the political crimes defense is, it works to bar extradition in cases where the risks of victors' justice run high. It creates an automatic presumption of injustice that does not offend any particular foreign regime because it applies equally to them all. It is something that judges know how to apply because it has been around for a long time, and the inquiry it sometimes requires into whether an uprising exists is no more offensive to foreign regimes than an inquiry into the fairness of their legal systems would be. Statement of Professor Pyle, p. 52, footnote 84.

With respect, I believe that the political offense exception is simply too crude a defense to be functional as applied to the struggle in Northern Ireland. Application of an automatic presumption of injustice there results in murderers like Doherty being automatically granted safe haven in the United States from British prosecution. Such a result is demanded neither by the doctrine of political asylum nor by any other applicable policy consideration.

Professor Pyle and others have claimed that elimination of the political offense exception along the lines proposed by the Supplementary Treaty would be unconstitutional. See, e.g., Statement of Professor Pyle, pp. 49-52. Supported by some historical analysis, Professor Pyle contends that:

> Central to the American concept of liberty is freedom from political persecution for all persons under the protection of our laws and constitution. This means aliens as well as citizens, because the Fourth Amendment protects the right of "the people" to be free from unreasonable seizures of persons, and the Fifth Amendment guarantees due process to "persons," not just citizens. The First Amendment is written as a sweeping limit on the power of Congress, and therefore also should be interpreted as curbing the power of that body to affect the political freedoms of any person subject to its laws. The United States government has a

> constitutional obligation under all three Amendments not to be complicit in the political persecutions of foreign legal systems. Thus to hold that the political crimes defense is not integral to extradition (or, as this administration claims, can be taken away from the courts, in part or in whole) is to violate these constitutional obligations and to return to the jurisprudence of the Stuart Kings. Id. at 49-50.

As attractive as this argument is in many ways, I believe it is not supported by practice or case law. First, as Professor Pyle concedes, not all extradition treaties of the United States contain the political offense exception, and the courts have adopted the rule of non-inquiry, which reserves to the executive branch the decision whether humanitarian considerations preclude extradition in a particular case. Several U.S. extradition treaties expressly reserve the decision on the political offense exception to the executive branch. Although interpretation and application of the political offense defense may be a judicial function, the power to make treaties, with the advice and consent of the Senate, enables the President, free from judicial control, to decide the content of treaties, including whether an extradition treaty should contain the political offense exception.

Although the Constitution clearly requires that extradition hearings be conducted in accordance with due process standards, there remains the issue of the degree of due process required. In a closely analogous area, the Supreme Court has recognized that the full panoply of due process rights is not applicable in deportation hearings. See Galvan v. Press, 347 U.S. 522, 531 (1954); Fong Yue Ting, 149 U.S. 698, 730 (1892). In the Fong case, the Court stated:

> The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject. 149 U.S. at 731.

The closeness of the deportation analogy is illustrated by the case of Mr. McMullen. After the magistrate determined that McMullen could not be extradited to the United Kingdom because his acts fell within the political offense exception, the United States Government attempted to deport him to the Republic of Ireland. An immigration judge granted McMullen's application for withholding of deportation, but the Board of Immigration Appeals reversed. On appeal, the Ninth Circuit granted McMullen's petition for withholding of deportation, holding (1) factual findings under the Refugee Act of 1980 are subject to review under the substantial evidence rule; and (2) substantial evidence did not support the Board's finding that McMullen had failed to show a sufficient likelihood of persecution for his political beliefs if he were deported to the Republic of Ireland. In his petition, McMullen alleged that the Provisional Wing of the Irish Republican Army would regard him as a traitor for dropping his membership; that the PIRA systematically tortured and murdered those they regarded as traitors; and that the Government of the Republic of Ireland was unable to control the PIRA. He also alleged that the Government of the Republic of Ireland would prosecute him as a former member of the PIRA. McMullen v. Immigration and Naturalization Service, 658 F.2d 1312 (9th Cir. 1981).

Although the Ninth Circuit ultimately decided that Mr. McMullen could not be deported to the Republic of Ireland, it did so on the basis of its application of statutory criteria set forth in the Refugee Act of 1980 to the facts of McMullen's situation; not on the ground that to deport him would be unconstitutional.

In sum, while I favor the courts rather than the executive branch deciding humanitarian issues that arise in extradition cases, I do not believe that this allocation of authority is constitutionally required.

CONCLUSION

As the above discussion indicates, I favor ratification of the United States-United Kingdom Supplementary Extradition Treaty, but with reservations that would reserve to the courts the decision whether an accused had a combatant's privilege under the law of armed conflict to commit the alleged crime as well as the decision whether extradition would be precluded by humanitarian considerations. Although I favor these reservations as a matter of policy, I believe neither is required by the Constitution.

I would also urge the Senate and the House of Representatives to return to the important task of revising the extradition laws of the United States. Appropriate revisions of U.S. extradition law would constitute a major step forward in the effort to combat international terrorism.

STATEMENT OF LOUIS FIELDS, JR.

Ambassador FIELDS. Thank you, Mr. Chairman.

I am privileged to be here, before your subcommittee and I regret that it is somewhat impromptu because I had expected to be winging my way to China today. But those circumstances changed and I am happily before you today.

I am particularly impressed to be in the company of such distinguished professors and members of Government. Having been a former government official—indeed, a colleague at one time or other with all of the gentlemen sitting here, Profs. Baldwin, Murphy, and Blakesley in the Legal Adviser's Office.

Thus, in the company of such learned legal scholars, I feel a little inadequate to speak as a legal expert to you. I do, however, have some very practical experience which I think might be helpful to the subcommittee in considering the question of the supplementary treaty.

I was the first Assistant Legal Adviser who was assigned the responsibility of providing legal counsel in the area of our State Department's effort to combat international terrorism.

I wrestled with a number of the factors that are involved in this effort, factors that are, as yet, unresolved. Problems such as the definition of "terrorism." This is something that has eluded us from the very foundation. And I submit, sir, that it is this problem that perhaps has given rise to the treaty which you are studying today.

There is a lot of confusion about the political offense exception. I recall while I was Assistant Legal Adviser, a young Palestinian, Mr. Zyiad Abu Eain, who was arrested in Chicago and Tom Sullivan who was then the U.S. attorney in Chicago, called me to ask if the Department would provide a witness at his extradition hearing to assist the magistrate in determining whether or not the offenses of which he is charged would be regarded by the requested state, the United States, political character and thus, exempted under article VI of the United States/Israel Extradition Treaty.

There was a certain reluctance in the Department to provide such a witness, since traditionally we had never done so. The advent of international terrorism has, however, given rise to great confusion over its application inasmuch as a terrorist's actions are often political motivated.

I was successful in getting the Department to approve, the provision of testimony in that case and it fell my lot to do so. I traveled to Chicago and testified that it was the view of the Department of State as the requested state, that crimes against innocent civilians, and civilian populations are proscribed acts and, as such, were common crimes, punishable in both states.

What I had intended to do in that case, was to carve out an area in this problem of political offense exception for violence directed, not against governments, or officials of government, or the institutions of government, but against innocent people—the bystanders, if you will. The bomb that Mr. Abu Eain set off was in a trash bin in a public market place in Tiberius—an uncontested area in the Israeli/Palestine problem. That bomb killed two teenage Israeli boys, maimed almost 40 people, many of whom were mere tourists. It seemed repulsive that such acts should go without bringing the accused perpetrator before the bar of justice.

Israel requested Abu Eain's extradition, and Mr. Sullivan was anxious to win this case. He was faced with the problem of the *McMullen* decision which had been rendered a few months before this case. A California magistrate had freed Mr. McMullen, who was accused of having set off a bomb in a barracks in England, having determined that Mr. McMullen's act was a political offense, and therefore, he could not be extradited to Great Britain to stand trial.

Without going into the distinction between the two cases, I felt that there was confusion as to what constitutes the political offense. Perhaps just a word, political offense is something that has evolved over a period of time.

It started out as what we would call a pure political offense—such things as sedition, treason, espionage, so-called passive events. Later, a line of English cases embellished this theory, establishing what are known as related political offenses. These are common crimes which are so related to a political act or a political demonstration that they would be brought within the purview of the political offense exception.

This creates the problem because the cliché of terrorism—"one man's heroism is another man's terrorism"—becomes fully operative in this sphere.

For this reason, it seems to me that we need to find a means to carve out from terrorist activity, those acts of violence that victim-

ize innocent parties. This is certainly one of the motivating factors, I suspect, that the international community has seen fit to develop certain conventions which make international crimes certain acts against civil aviation.

Because this is, again one of the instances, where innocent civilians are brought into the whirlwind of the political grievance. A man hijacks an aircraft and a Senator or a businessman or a tired old Ambassador riding on that aircraft, not a party to the dispute in question, and therefore an innocent bystander but then converted into an innocent victim. The same thing applies to internationally protected persons, and the same thing applies to hostage taking. I think that it is very interesting to note in these international conventions, because they are dealing with so-called terrorist crimes, recognize that these crimes should be excepted from the political offense exception.

So, that recognizes, if you will, an international disposition, by treaty, to say that certain offenses will not be political offenses. I think, perhaps, that this might be an indication to us how we can go about dealing with terrorists.

It seems clear to me that in a society such as ours—a democratic society that has pride in our institutions of justice—that we should strive to see that terrorists are brought before the bar of justice. That should create problems for no one, certainly in our society. The manner in which these terrorists are brought before the bar of justice obviously will occupy the attention of many and it certainly is an element of the inquiry before your subcommittee today, sir.

The question is, then, Should we, by treaty, with Great Britain, seek to eliminate the political offense exception? And I think that this is a pertinent question and a question that we need to examine very carefully. It is, of course, perfectly within the right of contracting parties, to do that. It violates no law. Professor Baldwin, a counselor of international law, when I was in the Department has written about this question. And in his papers, suggests that if this treaty were ratified, it would probably pose no constitutional problems. And I think that I tend to agree with that.

Senator HATCH. Ambassador, your time has expired.

Ambassador FIELDS. Yes, sir.

Senator HATCH. I appreciate your testimony.

[Prepared statement follows:]

Prepared Statement of Louis G. Fields, Jr.

Mr. Chairman, I appreciate the honor of appearing before your Subcommittee on the Constitution which is considering the impact of the Supplementary Extradition Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland upon American domestic law and our constitutional process. It is humbling to be a part of a distinguished panel of witnesses whose academic and professional accomplishments give me pause to contemplate my ability to add much to their learned contributions to this hearing. I do, however, have some practical experience in dealing with the legal aspects of our government's efforts to combat international terrorism which may be of value to the Subcommittee in this hearing.

For slightly over seven years, I served as the Assistant Legal Adviser for Special Functional Problems in the Legal Adviser's Office of the Department of State (1974-81). One of my major responsibilities was the provision of legal counsel to the Department's Office for Combatting Terrorism.

Throughout these seven years we grappled with a myriad of problems, both legal and policy, associated with the emerging phenomenon of international terrorism. The reality of international terrorism was burned into the world's consciousness by the brutal murder of Israeli athletes in Munich during the 1972 Olympic Games. Since that tragic event we have been trying to get this blood-thirsty genie back into the bottle.

One of our persistent -- and yet unresolved -- problems has been our quest for an agreed definition. The dilemma is best presented in the most common cliché of terrorism -- "One man's heroism is another man's terrorism." And this, Mr. Chairman, is, I suggest, at the heart of the frustration which gave rise to the Supplemental Treaty we are considering today.

I was the first Departmental witness in the collective memory of the Legal Adviser's Office to appear before an Extradition Magistrate to state the view of the United States, as the requested state, whether the crime charged was a "political offense". Many extradition treaties

contain the so-called "political offense exception" which enables a requested state to refuse extradition if it regards the subject crime to be political in nature. The case was that of a young Palestinian, Zyiad Abu Eain, who was charged by the State of Israel with having set off a bomb in a public marketplace in the City of Tiberias on May 14, 1979, killing two teen-age boys and maiming over thirty other people. The young Palestinian had been arrested in Chicago and his extradition had been requested by the Israeli Government. The United States Attorney in Chicago, Thomas P. Sullivan, called me to ask if the Department would provide a witness to advise the Magistrate as to whether the United States regarded the offense in question as "one of a political character". Article VI of the U. S.-Israel Extradition Treaty exempts offenses "regarded by the requested party as one of a political character" and Mr. Sullivan was concerned by the finding of a California Magistrate in the recently decided extradition case of In re McMullen (N.D.California, 1979). Familiar with the McMullen ruling in favor of an IRA member charged with a bombing in Eng. I shared Mr. Sullivan's concern and set about to gain authority to testify. Tradition augured against the Department becoming involved in extradition hearings other than providing the customary documentary evidence and verifying affidavits; however, the political undertones of contemporary terrorism and the McMullen case eventually brought the Department around. I went to Chicago and testified that "it is the view of the Department of State that indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act, and as such, is a common crime of murder, punishable in both states."

The "Political Offense" exception to extradition has evolved from the "Pure Political Offense" which was an act directed against a state but which contains none of the elements of ordinary crime (such as sedition, treason and espionage) to include the "Relative Political Offense" which is a common crime so connected with a political act that the entire offense is regarded as political. This evolution, coupled with the nature of contemporary international terrorism, has confronted society with innumerable legal and ethical dilemmas. These complex issues have resulted in one of the most confused aspects of our legal process. I know firsthand of the confusion -- certainly as it stood from 1974 through 1981. Since leaving

my post in Geneva this past January to return to law practice, back in the private sector, after many years in public international law and diplomacy, I have renewed my interest in finding or -- attempting to find -- some answers to one of society's most plaguing problems -- international terrorism. This appearance marks my first public return to an issue which dominated almost one third of my professional life.

In the Abu Eain [1/] case, I successfully sought to carve from the political offense exception indiscriminate violence directed not against a state but against ordinary citizens .... the bystanders to the political process whose only contact with government is through citizenship or, as some in the Abu Eain case, tourism. This, Mr. Chairman, is but a small step in dealing with one important effort to combat terrorism .... bringing the terrorist to justice. With the recent action of President Reagan to gain custody over the brutal and murderous pirates of the ACHILLE LAURO, we have seen a much more dramatic step. ~~Too long.~~ Our frustration has mounted over the failure or inability of civilized nations to bring violent terrorists before the bar of justice.

Historically, our courts have ignored some rather extraordinary means of bringing criminals within the jurisdiction of those courts. For many years the Kerr-Frisbie rule ~~allowed~~ sanctioned some rather bizarre acts in rendering fugitives to our jurisdiction. Once before U. S. courts, all of our constitutional guarantees operate to protect the accused, regardless of citizenship or nationality. The Toscanino, [2/] Lujan [3/] and Lira [4/] decisions (and perhaps some later cases) have circumscribed the Kerr-Frisbie rule to deny jurisdiction to U. S. courts where agents of our government engage in proscribed conduct. Once before courts, constitutional due process is applied. Toscanino, Lujan and Lira all involved cases concerning notorious narcotic traffickers and, indeed, we were -- and are -- anxious to bring international narcotic traffickers before our courts.

1/ Eain v. Wilkes, 641 F. 2d 504 (7th Cir., 1981); cert. den. 102 S. Ct. 390, 454 U. S. 894, 70 L. Ed. 2d 208.
2/ U.S. v. Toscanino, 500 F.2d 267 (2d Cir., 1974)
3/ U.S. ex rel. Lujan v. Gengler, 510 F.2ed 62 (2d Cir. 1975), cert. den. 421 US 1001, 95S.Ct. 2400, 44 L.Ed 2d 668
4/ U.S.v.Lira, 515 F2d68 (2d Cir., 1975) cert. den. 410 U.S. 967, 93 S. Ct. 87, 46 L.Ed 2d 69

International conventions have codified certain crimes as international crimes, such as trafficking in narcotic drugs and white slavery. Under the general subject of terrorism, international conventions have made hijacking, sabotage and interference with civil aviation, crimes against diplomats or other internationally protected persons, and hostage taking international crimes and removed them from the ambit of the "Political Offense Exception". It was clear to the negotiators that terroristic crimes are often politically motivated. While the Political Offense Exception was not intended to depend solely on the motivation of the offender, there is no doubt that the question of the application of the Political Offense Exception is shrouded in confusion, especially when it is invoked to exempt a terrorist from extradition. Judge Harlington Wood of the Seventh Court of Appeals reflects on this confusion in his opinion in the Abu Eain case, as follows:

> "Terrorist activity seeks to promote social chaos. Modern international terrorism is a phenomenon apart from the world's experience with more conventional expressions by individuals or groups of their dissatisfaction with world order. Such terrorism does not conveniently fit the categories of conflict with which the courts and the international community have dealt in the past. An ongoing, defined clash of military forces may be significant because that is one backdrop which may bring into sharp relief an individual act of violence. Once the circumstances move away from that context, the Judiciary's task of determining what degree or type of violent disturbance permits a successful invocation of the Political Offense Exception becomes more diffiult."

Judge Wood goes on to point out that "If anything, one of the major criticisms leveled at American extradition law is that Federal courts have tended to invoke the Political Acts Exception in situations of common crimes mixed with political overtones upon a showing of 'any connection, however feeble' to an uprising or rebellion or condition of domestic violence."

Judge Wood's observation about the elastic tendencies of Federal courts in extending the Political Offense Exception suggests a strong rationale for the Treaty under consideration by the Subcommittee today. The desire of civilized governments to bring terrorists to justice is understandable and correct. The frustration in the pursuit of that goal by a court which applies a tenuous connection between a

violent act and some obscure cause -- political or otherwise -- to which the perpetrator may be committed would invite, as noted by Judge Wood in his opinion, "an influx of terrorists seeking a safe haven in America". Judge Wood then echoes the despair of all Americans who long for a means to make the international terrorist accountable for his wanton acts when he wrote:

> "Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our own domestic criminal violence with which to contend without importing or harboring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the Political Offense Exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere."

There should be no doubt that we need to find appropriate ways to assure that terrorists be brought to justice for their acts. Where our legal instruments are inadequate to accomplish this, they should be improved. Where our legal procedures are perverted or confused, they must be corrected. I know that the Political Offense Exception has become the key to freedom for accused terrorists and thus I can understand the desire of governments to remove it as a complication to a legitimate desire to see justice done. Treaty partners are free to amend treaties where amending procedures are permitted. Amendments, like the original treaties, are the product of negotiation and agreement. They are subject to applicable ratification procedures established by law or custom. Under our Constitution treaties are negotiated and signed by the Executive Branch and thereafter submitted to the Senate for advice and consent for ratification. This is the prerogative and responsibility of the Senate, and the Senate's deliberations enrich the vitality of the treaty-making process. There is yet another check in our system of checks and balances to assure that our treaty-making is consistent with our Constitution and that is through Judicial review. I have participated in the negotiation of treaties and agreements and I know that they can be fallible. I admit to having had some qualms about the Treaty before this Subcommittee -- not about the intent of the negotiators, nor the

propriety of the undertaking, but rather about the wisdom of removing the right of the courts to adjudicate the question of the application of the Political Offense Exception and the possible question of ex post facto application to cases previously decided. My reservations have been carefully addressed by this Subcommittee and the Senate Foreign Relations Committee and I am comfortable in the knowledge that this distinguished upper body of our Congress will bring its wisdom in the exercise of its advice and consent process. Moreover, I have no judicial robe and would not presume to usurp the prerogatives of the Court in considering any constitutional impediments which may inhabit this negotiated instrument. Should impediments exist, they will be found and adjudicated.

I hope that my knowledge, background and experience gained in seven years of laboring in the trenchs of our country's efforts to combat the menace of international terrorism, which I have been privileged to share with your Subcommittee, Mr. Chairman, will contribute to your consideration of this important issue. We must persevere in this fight to bring terrorists to justice and not be timid in considering bold initiatives and appropriate means to accomplish that goal. This Treaty must be viewed in that context and examined in the light of its contribution to this effort within the constraints of our Constitution and our laws.

Thank you, Mr. Chairman.

Professor Baldwin you may speak.

STATEMENT OF GORDON B. BALDWIN

Professor BALDWIN. I suppose that it is fitting to talk on Guy Fawkes' day about constitutional balance. Guy Fawkes failed to overturn a constitutional balance. But I am very much afraid that this particular treaty does impose some risks to our contitutional balance and I will briefly try to explain.

I think that the cure here is worse than the disease and what we ought to do is to try to focus more directly on the problem, the problem is illustrated by the four cases in which extradition to Great Britain was refused.

Now, as I look at those four cases, it seems to me that you can make a pretty good argument that the political offense doctrine was misapplied. These are cases in which Federal District Courts were mesmerized by the slogan, political, and really did not look into the history that Judge Sofaer has covered in some of his testimony here, and previously.

The political offense doctrine represents a code word. It represents a humanitarian value. It represents the conclusion based on an individual appraisal of facts that a particular person is not going to get a fair trial if and when they are returned to the demanding country.

A part of the problem is that a decision is made by a Federal district judge and there is no appeal. The Federal judiciary is highly competent, but among so vast a brood of judges there are the halt and the blind, and occasionally, errors occur.

We need an appeal system. If the Federal district judge makes a decision that the offense is political, there ought to be some way of reviewing that in the higher ranks of the judiciary. The Circuits could do this, but it is presently not appealable and that is one of the problems that is created by the political offense doctrine today.

There are three institutions that are involved in this question that we have to face. The political decisions, the foreign policy decisions are appropriately made by the Department of State. They, by refusing to extradite, will pay a political price if they violate a treaty. They create foreign relations problems.

The second problem, is one of individual rights. The State Department for all of its competence, is not equipped to make the individual appraisal of interests, of fairness and justice in an individual case that fifth amendment due process requires individuality. The State Department does not have an adversary proceeding where they decide to extradite or not extradite. They will hear people bringing their letters and comments from Senators, and comments from friends, but basically they make foreign policy decisions.

We need checks on the executive.

A good illustration in recent law of judicial evaluation of a State Department decisionmaking arose in the *Geisser* case. Mrs. Geisser was an orphan because she had killed her parents in Switzerland, and was given a prison sentence in Switzerland and somehow or another escaped. Some years later, perhaps when she had become more mature, she was picked up in this country running drugs.

She made a plea bargain with the U.S. Government in which she agreed to testify on the drug trade and received some kind of a promise from the Department of Justice. She said the promise was that she would not be sent back to Switzerland. There was a dispute on that. In any event, when the Swiss did demand her extradition, a few years later, the State Department said, "We will send you back, you were escaped from justice and you are extreditable." But her response was, "Look, you promised me U.S. Government, that you would not send me back."

Well, it took about 5 or 6 years to sort this out. What did ultimately happened is that she was sent back to Switzerland, but there was a judicial evaluation of the promise that the U.S Government gave to her. The judge reviewed the diplomatic efforts that the U.S. Government undertook in the Department of State and the court made full evaluation of the executive proceeding.

We need judicial review of executive action. It goes back to *Marbury* v. *Madison*.

The judges need guidance. I think the four cases, better than anything else, illustrate the need of the judiciary for guidance. The law review articles are not very helpful, quite frankly. While professors have their virtues, giving judicial guidance is not one of our principal jobs.

Congress could make some rules. There are a multiple cluster of factors and I have outlined some of them in my prepared testimony. I would like to see a Congress list the variables that a good judge ought to consider in deciding whether or not an extradition decision of the Department of State is a correct one.

What troubles me about the treaty is that it is described as a precedent. It is a jurisdiction stripping bill and I think the Nation should be very reluctant, given our commitment to the constitutional balance, to strip the courts of their power to review executive action.

Thank you, Mr. Chairman.

Senator HATCH. Thank you.

I appreciate all of your testimony. It has been very, very interesting to me.

[Prepared statement follows:]

Prepared Statement of Gordon B. Baldwin

In eliminating the political offense exception from the serious crimes for which extradition can be demanded, the Supplemental Extradition Treaty with the United Kingdom is unwise but not unprecedented. Our 1980 Treaty with Mexico is similar.[1] As far as I can determine, however, this is the first significant debate on the wisdom of removing the political offense exception by treaty. Several bills have sought the same objective.[2] This treaty accomplishes what the Congress has heretofore failed to do - strip federal courts of their current role in determining whether or not a particular fugitive should be extradited because of the "political" nature of the underlying offense.

The new treaty, and similar proposed legislation, however worthy their purpose to prevent misuse of the political exceptions doctrine by our courts, denies the federal courts their proper power to check potential abuse by the Executive Branch.

SOME FEDERAL COURTS HAVE CREATED OUR PROBLEM

Demonstrably we have a problem. Several district courts have applied, and I believe misapplied, the political offense exception to frustrate efforts to extradite terrorists. Several fugitives from British justice have escaped extradition, and the State Department, the Justice Department, and surely the British Foreign Office, are among those despairing the results. Taking questions involving personal liberty away from the federal courts by stripping them of jurisdiction power is a commonplace response to irritation with the results of some decisions. These decisions include Extradition of Doherty,[3] In re McMullen,[4] and In re Mackin,[5] where several fugitives from British justice successfully invoked the political offense exception to foreclose their extradition.

THE FUNCTIONS OF THE COURTS AND OF THE EXECUTIVE

Long tradition in the United States and Great Britain supports refusal to surrender political offenders. No one seriously disputes the values underlying that policy. The principal value is the protection of an individual's claim to fair and impartial justice. What is disputed, however, are two questions: what institutions should consider the scope of the exception, and what are the criteria for applying the political exceptions doctrine. To resolve those questions two distinct, although linked, interests must be weighed.

First, when we invoke the political exceptions doctrine we make a foreign policy choice to deny the request of a friendly nation. Foreign policy choices must be made by our executive branch with, of course, appropriate guidance from the Congress. Humanitarian values are not irrelevant but take second place to broader foreign policy claims. A refusal to extradite produces an international dispute - hence a refusal should not be lightly made.

Second, the political exceptions doctrine protects the liberty claims of an individual to humanitarian treatment. Our courts, not the Department of State, are the final guardians of liberty under the Constitution. It is elementary law that the meaning of due process, and the meaning of liberty are not defined exclusively by the legislature, or by the executive branch.[6] Courts are effective protectors of human rights

because courts are familiar with evaluating claims for basic fairness in individual cases. The need to focus upon particular facts in their operational setting makes a judicial decision to deny extradition necessarily ad hoc.

These two concerns, with foreign policy, and with a humanitarian concern for individual liberty, can best be addressed by allocating and sharing the decision-making process. Both the Department of State and the federal courts are now involved whenever an individual claims exemption from extradition. The federal judiciary is best suited to evaluating individual liberty interests, not the Department of State. The Department of State should make our foreign policy, not the federal judicary . The problem we face is how to shape the role of each in deciding whether or not to honor an extradition request. The role of both is supported by the recent decision, Eain v. Wilkes.[7]

Humanitarian and foreign policy concerns are obviously linked. A decision to extradite by the Department of State may jeopardize the liberty interests of the individual, and on balance be inhumane; a judicial decision finding the offense "political" on humanitarian grounds doubtless creates, or at least aggravates, an international dispute. This is inescapable. That a judicial decision has political consequences, however, does not by itself mean that the judiciary should not decide.

Tension between the foreign policy concerns of the nation, and the humanitarian values we espouse is engrafted into the institutions created by the Constitution. The tension can not be eliminated without jeoparizing our devotion to liberty under law.

Our Constitution deliberately creates friction among the three branches of the national government. This quality was shrewdly observed many years ago by Justice Brandeis, who said:

> "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Myers v. U.S., 272 U.S. 52, 293, Brandeis J. dissenting.

HARMONIZING THE INTERESTS

What's required to spare us the risks of tyranny is not elimination of one of the decision-makers, but the development of legal/political tools that will harmonize the tension between the two institutions. The tension today is not unmanageable, but I believe the Congress might make some rules managing judicial-executive conflicts more efficiently. However, what is needed are rules. We do not need to change the basic institutional structure functioning now.

Today, except under a few recent treaties, a fugitive in the United States claiming exemption from extradition as a political offender may claim that privilege from both the State Department and from the federal courts. Both the courts and the Department of State must concur before extradition will be allowed. Either may block a return. Admittedly the system is complex.[8] We have, however, a tolerable system in that the individual receives a full hearing on matters relevant to the extradition, and the interests of the executive branch can

be aired. The State Department can supply all the information it wishes to the courts, and the courts are justified in seeking the advice of the Department on matters of politics and foreign policy. We can improve the current system, but we can also make it worse, and I believe the Supplemental Treaty does harm.

DEFECTS IN THE SUPPLEMENTAL TREATY

My opposition to eliminating the political exception doctrines from judicial review is based on the following:

First, the Supplemental Treaty practically removes the political exception from any federal court review of an extradition request. It is hard to envisage any significant offense to which a court could attach the political exception. What this means is that the decision to invoke a political exception to a foreign request for extradition will be made, if it is made at all, by the executive branch. That is, only the President, or the State Department, will make a judgment not to honor a request for extradition because the fugitive is regarded by us as having committed a "political offense." I do not believe the Department of State is institutionally equipped to make principled decisions about the merits of any particular individual's claim to be immune from extradition. Their paramount values are, and should be, to promote the general interest of the United States, not the particular and peculiar concerns of an individual.

Second, the Supplemental Treaty creates an anomoly. Federal courts are empowered to define the political offense exception under most extradition treaties now in effect, but not in this new one, which may become a model for subsequent supplementary agreements. Consider two offenders who committed similar acts for similar motivations in two different countries. The one covered by the Supplemental Treaty, or one like it, is not entitled to claim a political offense in the courts, but the other offender, sought under a conventional treaty could. Does the offender covered by the Supplemental Treaty have a due process/equal protection claim? The answer is unclear. If fairness alone is the standard, however, the answer is obvious. Similar people in similar situations ought to have similar legal rights.

Third, the political offense doctrine, applied as an exception to the obligation to extradite a fugitive from foreign justice, supports an important liberty interest. As the law now stands the Secretary of State, and of course the President, have discretion not to extradite for any reason whatsoever. They may decide, for example, that the judicial system of the demanding nation would not supply a fair trial.[9] However, foreign policy judgments may dictate that the executive branch recommend extradition. Should a federal court be foreclosed from considering whether the nature of the offense is such that the offender would not receive a fair trial abroad? I do not think so.

Fourth, the treaty creates a new risk that the due process of law guaranteed by the Fifth Amendment will be denied. One can envisage a setting where a return of a fugitive to the demanding nation would be comparable to dropping the accused out of an airplane without a parachute. Clearly if the United States, following finding of extraditability, dropped the accused from an airplane the government would be violating the Due Process Clause of the Fifth Amendment. The political offense doctrine prevents the executive branch from doing the equivalent. It is a device that allows a United States court to decide that the offender's claim is stronger than the foreign policy interests favoring surrender.

Fifth, we are creating a precedent. This is an attempt to accomplish by treaty what the Congress has so far declined to enact by law. Bills to eliminate the political offender exception have thus far failed, as have other proposals to strip the federal courts of power in specific instances. The treaty is a precedent. We must remember that extradition treaties have a long life; but when they are revised a nation is likely to seek any concessions granted to others. Some extradition treaties need revision, including several drafted in the 19th and early Twentieth century.[10] Would we be willing to divest courts of their role if extradition were sought by Egypt, Yugoslavia, or Bolivia? Declining to give what we have given to others is hard to justify in a principled way without offense. Perhaps we encountered this difficulty with the Phillipines with whom we have an important relationship. A proposal to delete political offenses in a proposed extradition treaty with them inspired strong opposition in the Congress in 1982. What the Senate does with the 1985 revision of a 1972 Treaty creates another model that may last well into the 21st Century.

THE TREATY IS PROBABLY CONSTITUTIONAL ON ITS FACE

My objections to the proposed treaty are not lessened by concluding that the deletion of the political offense exception is probably constitutional on its face. The Supreme Court has allowed the Congress to confer discretionary power on the President,[11] and I conclude that the Court would validate the surrender of rule making power to the Executive Branch here.[12] Whether it would be constitutional as applied is another matter. A decision to extradite might still be challenged by habeas corpus on the ground that basic human rights would be violated by the surrender.[13] Even if abdicating total responsibility to the executive branch is constitutional it is not automatically wise. We may trust the judgment of the executive branch today, but we have no assurance of continued, or even consistent, wisdom on their part. Nor are we justified in having unconditioned confidence in our courts. Both the executive branch and the courts should play their proper role. What is needed are standards which the courts can employ.

PROPOSED STANDARDS FOR THE COURTS

In developing these standards, which legislation could supply, courts could be told that the political exceptions doctrine should take into consideration a number of factors. For example, it would not be appropriate to find a political exception in the following settings:

1. where the offender only subjectively believes the offense should be considered political;

2. where the offense is directed against diplomats or other persons enjoying the protections of international law.[14]

3. where the offense is specified in a treaty as an international crime.[15]

Courts could be directed to consider several other factors, including:

1. the extent to which the victims of the offense were chosen at random;

2. the extent to which the offense was prompted by political goals pursued in a manner protected under the norms of international law;

3. the extent to which the offense is part of a genuine civil uprising, rebellion, or widespread unrest of the type that triggers violent action by the contestants;

4. the extent to which less drastic measures were available to further the political goals of the offender;

5. the extent to which the offender will be punished in the demanding country for extraneous reasons, such as for race, color, sex, political opinion, tribal affiliation, etc.;

6. whether extradition would breach a promise made by the United States to the individual.[16]

Plainly federal courts applying these criteria, and engaging in a multi-factor analysis might reach conclusions with which the Department of State, and the Department of Justice might disagree. The Geisser case supplies a good example of the need for judicial inquiry after extradition has been approved by the executive branch. The Justice Department, in a plea bargain with Ms.Geisser, promised her that the government would make its "best efforts" to avoid her return to Switzerland. The Court of Appeals for the Fifth Circuit eventually stated that the extradition could take place, but only after concluding that the United States had fulfilled its bargain.[17] That Court meticulously reviewed the actions of the executive branch.

The cases of the I.R.A. fugitives who escaped extradition are examples of judicial misuse of the political offense exception. I disagree with the results of the judicial inquiry in those cases, because the courts failed to engage in any significant balancing of interests. No suggestion that the persons sought by the British government would not receive a fair trial according to international law standards was made. The fugitives appeared to be typical terrorists, quite different from people seeking freedom from oppressive regimes, who would be unfairly treated if returned. Courts enjoy an advantage over the executive branch in evaluating individual claims. They are able, through the adversary process, to discover facts more accurately than the methods traditional to the Department of State.

Let us guard against surrendering our liberties to the decision-making of the Department of State alone. Our system of constitutional government has flourished, not because of its efficiency, but because we have allowed the courts, the Congress, and the executive branch to work toward harmonizing our interest in individual liberty with our concern for the general welfare. The general welfare will not be sacrified if we allow the courts to pursue their traditional function, protecting liberty in individual cases.

FOOTNOTES

1 31 U.S.T. 5059, T.I.A.S. No. 9656 (1980)

2 S. 1940, 97th Cong., 2d Sess. § 3194, which passed the Senate Aug. 19, 1982; H.R. 6046, 97th Cong., 2d Sess. Both were reintroduced in 1983, S. 220 and H.R. 6046.

3 599 F. Supp. 270 (S.D. N.Y. 1984).

4 Cited in Note, American Courts and Modern Terrorism: the Politics of Extradition, 13 N.Y.U. J. Int'l Pol. 617, 637 (1980) and in Banhoff & Pyle, "To Surrender Political Offender": the Political Offense Exception to Extradition in United States Law, 16 N.Y.U. J. of Int'l L. & Pol. 169, 170 (1984).

[5] 668 F.2d 122 (2nd Cir. 1981).

[6] See Murray's Lessee v. Hoboken Land & Improvement Co., 56 U.S. (18 How.) 272 (1856) wherein the Court defined the meaning of "due process," and did not automatically accept what Congress provided. See also the infamous Dred Scott v. Sanford, 60 U.S. (19 How.) 293 (1857). Nor can the meaning of "liberty" be exclusively fixed by Congress, see U.S. v. Carolene Products Co., 304 U.S. 144, 152, n.4. (1938).

[7] 641 F.2d 504 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981) upholding extradition to Israel of a P.L.O. member. See also Plaster v. U.S., 720 F.2d 340, 349 (4th Cir. 1983).

[8] See 18 U.S.C. § 3184 (1948).

[9] The foreign trial proceeds need not comport with the American system of justice, of course. It is only essential that they meet minimum human rights standards, see Neely v. Henkel, 180 U.S. 109 (1901).

[10] For the example the Agreement with the Ottoman Empire signed at Constantinople, Agust 11, 1874, now applies to Egypt, 19 Stat. 572.; Our treaty with El Salvador was signed in 1911; with Belgium in 1902; Bolivia in 1900; Chile in 1900; and with Yugoslavia in 1901 (signed with Serbia).

[11] see U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[12] See Dames & Moore v. Regan, 453 U.S. 654 (1981).

[13] Plaster v. U.S., 720 U.S. 340, 349 (4th Cir. 1983)

[14] See Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons... Dec. 14, 1973, 28 U.S.T. 1975.

[15] Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U.S.T. 1641.

[16] See Geisser v. U.S., 513 F.2d 862 (5th Cir. 1975).

[17] See Petition of Geisser, 627 F.2d. 745, 750 (5th Cir. 1980), cert. denied, 450 U.S. 1031 (1981).

Senator HATCH. Professor Murphy, what is the advantage of having a political offense exception to the general U.S. extradition practice?

Is it really necessary? Does not the growth of criminal violence on an international level make the political offense exception outdated or impractical?

Professor MURPHY. Mr. Chairman, I think that we would be well off dropping the term "political offense exception," because I regard it as ambiguous, if not more so, than terrorism.

It seems to me that we should direct our attention instead, to the goals and values that the political offense exception was designed to serve. I would regard these goals as twofold.

One, the humanitarian one that Professor Baldwin has mentioned, is that one should not send somebody back to a place where he is going to be persecuted on the ground of his political belief or if he is going to be subject to unfair courts.

And the second value underlying the political offense exception is the question of neutrality. That is, one should not become involved though the extradition process in civil wars in other countries.

It seems to me that with respect to that second value, that is, of neutrality, it should become operative only in a situation where the conflict has evolved to a point where the Law of armed conflict applies and as a result the accused would have a combatant's privilege and the United States would intern the accused in accordance with its obligations under the law of armed conflict.

It seems to me, that both of these values, should be protected by the courts, but the directions to the courts, ideally through congressional legislation, should be very specific on these two points. The political offense exception is just a mish-mash that confuses everyone and does not serve the goals that should be served.

Senator HATCH. Does the extradite or prosecute maxim contained in a number of treaties and conventions—for example, the Anti-Aerial Hijacking Treaties, and The Convention Against the Taking of Hostages--does that reduce the importance of the political offense exception or make the political offense exception even more significant within the context of contemporary international domestic law?

Would you like to address this question, Professor Blakesley?

Professor BLAKESLEY. Sure.

I think that with regard to those conventions, it is fairly clear, to use current, but what Professor Murphy suggests obsolete and confusing terminology, that those sorts of offenses are probably not within the political offense exception. The international community has considered those to be international crimes, and they are certainly crimes domestically as well. Therefore, they would be, one, extraditable and two, not within the political offense exception.

If the Government feels it necessary to define that further, or to denominate it accurately, then it ought to do so and can do so in a treaty. So the first portion, the list of crimes that finds itself in the supplementary convention, which relates to those crimes made international offenses by conversions or treaties, presents really not much of a problem.

The problem comes with the second group of crimes, which are common crimes, which certainly may be committed by terrorists, but also would be committed by any armed combatant, one who even is protecting him or herself in self-defense. As you know, in the extradition process, you are not allowed to raise defenses, so that someone could be extradited pursuant to protecting him or herself in the statehouse while being attacked by rebels that eventually win. That is the ludicrous aspect of the treaty and its application. So I think that certainly those conventions are significant and they also suggest the danger of this treaty.

Senator HATCH. Professor Baldwin, can treaties or provisions contained in treaties, override standards prescribed by the Constitution?

For instance, are treaties, by operation of law, considered to be equal to the Constitution, and if this is true, does this not make their provisions exempt from constitutional prohibitions?

Professor Baldwin. Well, that is the debate that continues.

There are dicta, in *Rerd* v. *Covert,* deliberate and unnecessary dicta spoken by Justice Black about 1957, stating that a treaty could not violate the Constitution.

That represents mainstream thought. The opposite view, that the treaty can violate the Constitution, is traceable to some loose language of Justice Holmes in *Missouri* v. *Holland,* a 1920 case, which cites the text of the Constitution, which says, of course, that treaties can be made under the authority of the United States, but that laws have to be made pursuant to the Constitution.

Historically, that is understandable, because when the framers drafted the Constitution, they wanted to preserve the peace treaty with Great Britain of 1783, and the alliance with France of 1777, both of which, predate the Constitution. These treaties were not made pursuant to the Constitution.

The conventional wisdom today, and there are lower court cases backing it up, is that a treaty must be consistent with the Constitution.

Senator HATCH. Ambassador Fields said that the treaty did not define terrorism. What is a terrorist? Should military and police personnel be considered targets of terrorism?

What would be the effect of only centering on innocent civilians as targets of terrorism?

Ambassador FIELDS. Mr. Chairman, if you can define terrorism, you ought to win the Nobel Prize, because we have been grappling with this definition for the last dozen years, to my certain knowledge. I would think that it would be extremely difficult to find a definition of terrorism that even the United States and Great Britain could agree to.

The problem with terrorism is that the cliché that I referred to earlier, about one man's heroism being another man's terrorism, is operative throughout this entire subject.

It is extremely difficult to draw the fine lines between your hero and the other guy's terrorist. And therefore, it would be difficult, I imagine, to, in this treaty, so define terrorism that you would be able, by some language, to overcome the problems that Professor Blakesley has suggested. For example—murder, how would you

define a murder in a terrorist context from murder in a nonterrorist context?

We tried, to a smaller degree, to achieve that in the *Abu Eain* case, because murder was obviously one of the crimes with which he was charged. In that, we tried to say that those civilians—those teenaged boys and those tourists—who were in Tiberius, in that marketplace that day, were killed or maimed, that this constituted terrorist murder, a common crime, and that it should not be protected by the political offense exception.

I think, in trying to draft language, the precision of language in a treaty, you would create more problems than you would solve.

Senator HATCH. All right. Thank you.

Well, I think that the experience of this panel is truly distinguished and impressive as well. I would like each of you to sit down and take some time and make some recommendations to us for the future extradition problems and matters that will arise before the Congress of the United States.

Is extradition the best legal weapon to fight against terrorism? I am interested in this specific question. I would also like to have your recommendations with regard to this treaty.

I see many things that I like about the treaty and many things that I do not like.

I think that you have enlightened us a great deal today, as have the two previous witnesses, regarding the merits and demerits of this particular treaty.

I believe that this is a very important issue. It is one that has caused a great deal of discontent and in my opinion, rightly so. It involves some very intricate questions of politics and the Constitution, treaty power and practice, and, I think, international law, among other things.

So it is not as simple an issue as it is sometimes portrayed, and I think that each of you has helped to make that clear.

I would like to have any suggestions that you can make to our committee. I am very much opposed to terrorism in any form. I want to do everything that I possibly can. But I am also very much dedicated to upholding the Constitution, and upholding our constitutional relationships among nations.

As much as I want to stamp out terrorism, I also want to make sure that we do not stamp out some rights in the process as well. And sometimes it takes some of us who sit in these seats to be a bulwark against potential abuse in the zeal to do something positive against terrorism, which certainly is a very, very terrible thing that is going on in our world today.

So we have to look at this in a detached way and see what is best in the long run. What really should we be doing here? We have to take into consideration some of the political matters. If I were a Catholic in Northern Ireland, I might be very upset about what this treaty actually represents.

In fact, if I were a Protestant in Northern Ireland, I might likewise be pretty upset under certain circumstances, and there are a lot of people upset.

So we would like to draw upon your collective intelligence and experience to help this committee. This is going to be debated, and

I would hope that when it is debated, we can debate it intelligently. Perhaps it needs to be corrected intelligently.

So I would appreciate any additional help that you could give to us and if you could accommodate us quickly, we would appreciate it even more because I think that it is going to come down to some decisions made between now and the end of the year. I hope that we can approach this in a very organized manner, and do over the long run what is best for all concerned.

So with that, we will recess until further notice, thanking all witnesses for appearing and also those who have been interested in this hearing.

[Whereupon, the hearing was adjourned at 10:50 a. m., to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL STATEMENTS AND VIEWS

British Embassy
3100 Massachusetts Avenue NW Washington DC 20008
Telex Domestic USA 89-2370/89-2384
Telex International 64224(WUI)/440015(ITT)
Telephone (202) 462-1340

Your reference

Our reference

Date 26 September 1985

Mr Stan Parrish
Office of the Hon Orrin G Hatch
135 Russell Senate Office Bldg
Washington DC 20510

UK-US SUPPLEMENTARY EXTRADITION TREATY

On 25 June the British and US Governments signed a new Supplementary Extradition Treaty, the principal effect of which will be to deny fugitives accused or convicted of certain serious crimes the ability to avoid extradition on the grounds that their offences were "political". The United States Senate's advice and consent to ratification is now being sought, as in due course will be the approval of the UK Parliament. I enclose recent editorials in the 'New York Times' and 'Chicago Tribune' endorsing the new Treaty.

We see this new Treaty as a significant, practical contribution to the fight against international terrorism. Stable and reliable extradition arrangements have long been regarded by the Western democracies as an important part of our defence against terrorists. Unfortunately in recent years terrorist fugitives from UK justice have been able to find safe haven in the United States. There have been four such cases, all involving members of the Provisional IRA convicted of or wanted for murder or attempted murder. Three of the four cases involved the death of or injury to civilians. Yet the courts accepted that, under the present UK-US Extradition Treaty, the offences were "political" and that the individuals concerned should not therefore be extradited. A note on these four cases is enclosed.

In recent years, many Western European countries have come to the conclusion that the political offence exception to extradition should not be applicable to serious crimes of violence. They believe that in democratic societies with independent judicial systems, the only defensible way to promote one's political views is by peaceful and constitutional means : the ballot, not the bullet. This was the principal objective of the European Convention on the Suppression of Terrorism 1977 which became part of UK law the following year by means of the Suppression of Terrorism Act. There have also, as you know, been moves in the US Congress to limit the political offence exception to extradition in US domestic law. The Supplementary Treaty continues this process by specifying certain serious crimes of violence and offences under four international conventions on terrorism to which the political offence exception would no longer be applied. No distinction is made between offences against civilians and those against the police or armed forces. This is an important matter of principle. We cannot accept that innocent

/men

men and women may be regarded as legitimate targets for terrorists simply because they wear a uniform. We do not believe that violence has any place in a society which is open and free.

The British and US Governments want reliable extradition arrangements which ensure that terrorists are brought to justice. But the present Supplementary Treaty does not extend the range of extraditable offences. If the offence with which the fugitive is charged in the United Kingdom is not a US felony punishable with 12 months imprisonment or more, there can be no extradition. That principle of double criminality will not change with the new Treaty. Nor of course does the new Treaty diminish the requirement that there should be a substantive case against the fugitive which is tested in the US or UK courts : both sides will continue to have to provide full details of the person sought, the facts of the offence, the legal provisions establishing the extraditable character of the offence and so on. Nor will the Supplementary Treaty diminish the standard of evidence required to convict the fugitive, if he has not already been convicted, in a court in the United Kingdom - though it should be added that the principal issue in contention in the US court is usually not whether the fugitive is guilty of the offence, but whether the offence was politically motivated and justified. Finally, the new treaty will not affect the US Government's right to consider whether an extradition request was being improperly sought, eg. because of the fugitive's religious or political beliefs.

We are therefore confident that this important step in combatting terrorism can be taken without affecting the essential safeguards to which a fugitive is entitled. We welcome debate on the new Treaty. If you would like to discuss this further, please let me know.

N E Sheinwald
First Secretary

SYRACUSE UNIVERSITY
COLLEGE OF LAW

Offices of the Faculty

Syracuse, New York 13210
(315) 423-4476

February 20, 1986

The Honorable Senator Orrin G. Hatch
135 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

At the outset please permit me to state that I greatly appreciate the honor which was extended to me by the Subcommittee on the Constitution of the United States Senate Committee on the Judiciary to state my views on the Supplementary Extradition Treaty with the United Kingdom. I regret very much that I have not been able to set out my thoughts at length in a fully reasoned professional statement. This letter, which I am now writing at the cordial invitation of Professor Robert Friedlander, Assistant Counsel of the Subcommittee on the Constitution, is brief and in outline only. But it is intended to share with your subcommittee, as requested by Professor Friedlander, my thoughts regarding the merits of the debate regarding the "political offenses" (délits complexes) exclusion from the extradition of persons charged with violent crimes.

To clarify my position I should, perhaps, first state what I mean by "terrorism" in the paragraphs which follow. Parenthetically let me observe that I am guided by the definition given in the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, especially paragraph 2 in the following quotation:

> [International terrorism is an activity that]:
>
> 1. Involve(s) violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States (or of any state or that would be a criminal violation if committed within the jurisdiction of the United States or any state);
>
> 2. Appear(s) to be intended
>
> A. To intimidate or coerce a civilian population;
>
> B. To influence the policy of the government by intimidation or coercion; or
>
> C. To effect the conduct of a government by assassination or kidnapping; and,
>
> 3. Occur(s) totally outside the United States or transcend(s) national boundaries in terms of the means by which they are accomplished, the person they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

Generally speaking there are both prudential and morally compelling (imperative) arguments in favor of the Senate giving its advice and consent to the Supplementary Extradition Treaty with the United Kingdom. These arguments may be summarized as the utility and prudential reasons on the one hand and the imperatives of morality and obligation on the other. Hypothetically and prudentially speaking, if it is to the advantage of the United States to encourage friends and allies, who, we may consider, are not as undeviating in their

opposition to terrorism as we would like them to be, or consider ourselves to be, then it is to our disadvantage not to give an example of undeviating conduct. If other states, as for example those involved in the aftermath of the Achille Lauro seizure, are to be criticized for making exceptions, then we devalue those criticisms when we make exceptions ourselves. We give other states an example to do likewise, not only vis-à-vis the United States, but amongst themselves as well. Our example, moreover, would not only provide an excuse for states who drag their feet in apprehending and extraditing foreign terrorists on their soil, but also it could give an argument of self-justification to those other states who provide sanctuaries for the terrorists of their choice.

In the second place, the moral imperative I perceive here is that, although the Book of Joshua tells us of the establishment of Cities of Refuge whose concept comes down to us in our concern to grant refuge and asylum, yet in that Book there is the command that only the refugee who "smote his neighbour unwittingly, and hated him not before time," may have protection. Joshua 20:5; see also Exodus 21:12-14 (King James). Does not the granting of refuge to the intentional "lier in wait" make a mockery of that command's premise? Today it is still morally wrong to give encouragement and sanctuary to murderers because we then are announcing that we hold human life as cheaply as they do and are as casual about snuffing it out as they are.

The more down-to-earth legal considerations I would like to present to you relate to questions of the appropriateness of exporting the United States judicial procedures and mores and imposing them, on behalf of aliens whose alleged offenses were committed abroad, in this context the policy of the Supreme Court with regard to foreign courts is relevant. In addition the United Nations Convention on the Status Refugees of 1951 and its 1971 Protocol, the November 1985 Agreement between the London and Dublin governments, which tasks both sides to work together in the administration of the six counties (until a majority votes to join the Republic), and the promised United States aid expressing this country's positive appreciation of that sharing of responsibility, also should be considered in the context of the U.S.-U.K. Supplementary Extradition Treaty.

1. The Relevance of Foreign Courts' Practices and Procedures in Extradition Proceedings

Where extradition agreements exist the procedures of foreign courts are not germane to the consideration of rendition -- except for insofar as blatant denials of due process could give rise to refusals of rendition and even a denunciation of the treaty. On the other hand, while the practice of each of the parties' courts might be most germane considering whether or not to negotiate a treaty, the issue of due process should be resolved at that stage of negotiation. This would recognize the competence of the Executive, through its embassies and missions, and through this Nation's membership of, or relations with, international organizations, to determine the appropriate policies and make appropriate value judgments. Hearsay from the media is no substitute for factual, unbiased, verifiable and meaningful data. Such an accurate, objective, dispassionate and professionally responsible presentation of the facts is to be found in the document containing the Department of State's Responses to Questions which were submitted for the record after Judge Abraham Sofaer had given his testimony before the Senate Committee on Foreign Relations. It was transmitted by William L. Ball III, Assistant Secretary of State for Legislative and Intergovernmental Affairs to the Honorable Richard G. Lugar,

Chairman, of that Committee. In particular I am referring to the thorough, professional, response to Senator Dodd's first question and that to the Committee Staff's fifteenth question. In addition I have in mind the testimony of the Legal Advisor of the Department of State, Judge Abraham Sofaer where he, himself a most distinguished judge, stated:

> Similarly, no one can seriously challenge the basic fairness of the British system of justice, even under the extraordinary situation that Britain has faced in Northern Ireland. To deal with that situation, the United Kingdom has developed special nonjury courts - commonly known as Diplock Courts - to try certain well-defined terrorists acts. Diplock Courts operate without a jury in order to eliminate the risk of jury intimidation and murders, especially likely in the trial of PIRA terrorists.
>
> The absence of a jury does not mean the central principles of procedural fairness are not maintained: trials are held in open court; witnesses may be called and cross-examined; the burden remains on the prosecution to prove guilt beyond a reasonable doubt; the accused has a right to legal advice and representation; and the right of appeal is completely unfettered.

2. The Policy of the Supreme Court with Regard to Foreign Courts

While it is the case that the primary object of the Supplementary Extradition Treaty is to permit the agreement to reach persons charged with crimes of violence abroad and taking refuge here (frequently here as illegal immigrants), the landmark case provides an a fortiori rationale. It relates to the authority of the United States government to hand over, for trial to the Japanese authorities, a United States citizen serving in the United States Army in Japan. In Wilson v. Girard, 354 U.S. 524 (1957), the Supreme Court found that there was no constitutional or statutory barrier whereby the United States should be precluded from delivering the defendant Girard to Japan, under the relevant agreements, to answer, in the Japanese courts, for his having caused, whilst on service in Japan, the death by wounding of a Japanese woman. The Supreme Court so decided despite the fact that the Japanese criminal courts did not try their cases to a jury and, indeed, had been stigmatized during oral argument, by Girard's counsel (Joseph S. Robinson), as "the most antiquated in the world." New York Times, Tuesday, July 9, 1957 p. 12 col. 4; see also Point VII Brief for Plaintiff. It is clear that the Supreme Court, in looking at the practice of foreign courts in cases where this delicate issue of whether the absence of trial by jury, per se, constitutes a denial of justice or due process is before it, applies the standard of "ordered liberty," which it enunciated, vis-à-vis state courts, in Palko v. State of Connecticut, 302 U.S. 319 (1937).

3. The United Nations Convention on the Status of Refugees 1951 and Protocol 1971 (Immigration and Nationality Act)

In its reply to Senator Pell's first question the Department of State observed that the Supplementary Extradition Treaty would not revise the application of the domestic law provisions which effectively implement the above Convention and Protocol. It points out, correctly, that the "Supplementary Treaty relates solely to the extradition process, not to the application of our country's immigration laws." An interesting instance however, that involving a former terrorist, now an alien in the United States, one Peter Gabriel John McMullen, illustrates how the two sets of laws may overlap with respect to one person. In the deportation proceedings which, in the Ninth Circuit Court of Appeals, had become McMullen v. Immigration and Naturalization Service, 558 F.2d 1312 (9th Cir. 1981), he claimed that he should not be deported to the

Republic of Ireland because he would be persecuted there for his political beliefs by the Provisional Irish Republican Army (PIRA) -- his checkered career showed him to be a deserter from the British Army and to have "resigned" from the PIRA. After serving a sentence in the Republic of Ireland for three years for his past PIRA activities, McMullen was released. Subsequently the PIRA reclaimed his services and he travelled to the United States on a number of occasions, "apparently," according to Judge Choy "to obtain guns." Ibid., at 1314. He was then ordered to plan and execute the kidnapping of an American bar owner, but refused that mission. A PIRA court of inquiry reviewed his conduct. Subsequently a friend warned McMullen that he would be "murdered for his disobedience." Ibid., at 1314. He fled to the United States having assumed a false name to obtain a visa. After arrival here he contacted the Bureau of Alcohol, Tobacco and Firearms and shared his knowledge of PIRA activities, both with the Bureau and with Scotland Yard investigators in the United States. In response to the INS deportation proceedings he gave information regarding the PIRA's brutality in executing "punishment" policies and tactics, and alleged to the court's satisfaction that the Republic of Ireland was unable to control the activities of the PIRA, with the result he would "suffer persecution" there within the meaning of the Convention and Protocol and within section 243(h) of 8 U.S.C. 1253(h). The Ninth Circuit Court of Appeals granted McMullen's petition on the ground that he had shown a sufficient likelihood of persecution to warrant the grant of asylum. (The British authorities thereafter commenced proceedings for the extradition of McMullen to the United Kingdom to stand trial for a number of murders including the deaths from terrorist bombings of some forty-three civilians on the mainland of Great Britain. These victims were not members of the British military, police, or other security forces.)

The Ninth Circuit Court of Appeals distinguished, and separated from the case before it, future possible action by the United Kingdom seeking extradition, and proceedings by the Immigration and Naturalization Service for his deportation to Great Britain as an illegal immigrant here. But, it should be noted, the issue of "political offense" creates an overlapping situation, since the protections of the Convention (and the Immigration Act) are stated not to apply to a person "with respect to whom there are serious reasons for considering that:

(a) . . . .

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) . . . .

By a negative, but necessary, implication, the Act would thus appear to provide for asylum for those guilty of crimes of violence abroad so long as they can satisfy our courts of the "political" character of their offenses.

4. The "Political Offender" Exception and Democratic Governments -- A Paradox

The "political offense" preclusion of extradition incubated as an idea during the French Revolution, with its provision of asylum for foreigners exiled from their home countries "for the cause of liberty" in Article 120 of the French Constitution of 1793; but it was first formulated in terms of non-extradition in Belgium's famous Extradition Law of 1833. In that same year of 1833, Russia, Prussia and Austria concluded treaties which stipulated that individuals who had committed crimes of high treason, lèse-majesté, or who had conspired against the safety of the throne and the legitimate

Government, or had taken part in a revolt, should be surrendered to the state seeking to punish them. Thus, at a time when traditional, monarchical autocracies and democracies co-existed, the former stood for the rendering up of persons guilty of political offenses, while the latter sought to cast their mantle of protection over people struggling for democratic rights. The democratic states' goal was to substitute the bullets of the autocrats for the ballots of free societies. Today, as the daily press makes clear beyond all contradiction, terrorists of all ideologies contemptuously reject open government through free speech, universal and secret ballot and the rule of law. When given the chance they have treated these institutions with the contempt that their love of brutality and violence engenders for the values of democracy and peace.

The United States' rejection of the present European democracies' drive for mutual protection against terrorists (as exemplified in the European Convention for the Suppression of Terrorism) is paradoxical in the extreme. While the right of dissent is cherished here in the United States no less than in other democratic polities, it is not permitted to step over the boundary of peaceful action, yet we seem to be acting in favor of encouraging violent dissent in foreign countries, permitting it, there, to overstep the limits of the democratic exchanges of ideas. In so doing our choice seems to favor turning the United States from standing as the champion against terrorism into a paladin of terrorism, and so becoming a competitor with Libya and Syria and as offering a safe haven for the guilty.

5. A French Miscarriage and the U.S. Rebuffed

On a number of occasions United States' law enforcement agencies have experienced the frustration of being denied their legitimate extradition requests, on the grounds of the "political offense" exception (délits complexes). In many of these cases U.S. officials have believed those denials to be erroneous.
Judge Sofaer has already outlined the case of Willie Holder and Mary Kerkow to this Honorable Subcommittee. Those fugitives had, while in the U.S.A., hijacked an aircraft en route between Los Angeles and Seattle, threatening to murder a stewardess, and demanded a large sum of money. They then sought and were given asylum in France, despite very professionally and convincingly framed requests for extradition arguing very ably and effectively for the exclusion of the "political offense" exception. In the eyes of the French criminal justice system, on the other hand, the hijacking was a délit complexe (equivalent to a "political offense") and was therefore non-extraditable. The reaction of the United States Embassy to France was to state, inter alia, that: " . . . serious crimes such as aircraft hijacking are so dangerous to human life and so inimiced to international order that they should not be regarded as political offenses regardless of the circumstances." McDowell, Digest of United States Practice in International Law 1975 at 168 et seq. (1976).

Judge Sofaer testified accurately and precisely to this Honorable Subcommittee, when he stated that some United States decisions on extradition are not unlike those of the French courts in the Holder and Kerkow cases. He said:

> In my view, some recent decisions in this country have applied the political offense exception as expansively and unreasonably as it has been applied against us by some nations.

Indeed, the admission by Judge Brieant in Matter of the Extradition of Francesco Pazienza, 619 F. Supp. 611 (S.D.N.Y. 1985), testifies to the accuracy of Judge Sofaer's view. Judge Brieant wrote:

> The task of definiting what is a political offense is left to the judiciary. This has resulted in a lack of uniformity in United States court decisions . . ., evidencing the difficulty in fostering objective legal criteria applicable to a political offense claim. Although there has been some effort to solve this problem by revising 18 U.S.C. § 3184, Congress has had no more success than the courts. . . .
>
> Despite the near absence of objective legal standards on this issue, it is clear that Dr. Pazienza's political offense claim must fail. Id. at 619.

The United States can scarcely have a good faith basis of complaint if her variable and equivocal standards are equally adopted by other countries rejecting her invocation of their aid in pursuing criminals who have fled to their jurisdictions. Thus refusals of extradition in cases like those of Holder and Kerkow can be expected to be increasingly justified on the bases of American standards and precedents. The political offense defense thus becomes a two-edged instrument turning against us at crucial times.

6. The November 15, 1985 Agreement Between the London and Dublin Governments ("The Hillsborough Agreement")

A tentative and delicately negotiated regime which came into being on November 15, 1982 as a result of the agreement signed by Prime Ministers Thatcher and Fitzgerald, has received approbation in the United States. In addition to general expressions of approval and relief the Congress has materially sought to endorse its encouragement, by positively considering to vote some $300 million of American aid to be spent over five years in Northern Ireland and along its border with the Republic of Ireland, to improve relations between the neighboring communities on both sides. The Hillsborough Agreement, with the opportunity for peace it vouchsafes, is opposed by the terrorists of Northern Ireland, as their statements and actions only too clearly testify. In addition, for years one of their objectives has been, by bombings and terror, to undermine the economic viability of the region. For America to grant asylum to those who, by committing what are alleged to be political crimes aimed against economic stability and development, and thereby negating the goals of the projected American aid package, would be absurdly contradictory and self-defeating. The money represents an American stake in the renewal of prosperity: asylum for terrorists equally represents a stake in denying that aid's intended efficacy for healing ancient wounds.

7. A Concluding Thought -- The Problem of Escalating Violence

The foregoing paragraphs by no means represent a professional disquisition. They are, rather, a collection of thoughts written down in haste. The thoughts themselves, however, have been gathered over a period of time from my reading, thinking and teaching about terrorism, aerial offenses, and extradition in the modern world. One point has become clear beyond peradventure in recent times as the politics of violence have moved from the clash of armies to the stealth, surprise and treachery which are the essence of terrorism, the political offense exception justifying the refusal of extradition has no place between democratic states. It merely provides a tactical advantage for the terrorist. It

also places a premium on the alternative to democracy and the rule of law -- violence. In so doing it undermines and "destabilizes" democracy and the rule of law. The interactions between democratic states which still retain, inter se, the exception may, indeed, lead to a continuing escalation of domestic violence in each as asylum resulting from the political offender defense is mirrored, in a type of infinite regression, between all of them. The avoidance of the danger inherent in such a regression provides the rationale for the emerging consensus which has led to the European Convention on the Suppression of Terrorism. By that Convention eight democratic countries have accepted limitations on the political offense exception without reservation or equivocation. This is the wave of the future. I respectfully recommend that the United States ride with it, not swim against it.

Respectfully and most sincerely,

L.F.E. Goldie

L.F.E. Goldie
Professor of Law
Director, International
Legal Studies Program

LFEG:mb

UNION UNIVERSITY
ALBANY LAW SCHOOL
80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208
518-445-2345

EDWARD GORDON
PROFESSOR OF LAW

November 6, 1985

Senator Orrin G. Hatch
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: U.S.-U.K. Supplementary Treaty on Extradition

Dear Senator Hatch:

I regret that an untimely bout of the flu prevented me from attending and testifying at yesterday's hearing on the subject of The Supplementary Treaty on Extradition between the United States and the United Kingdom. I appreciate your invitation to appear before the Subcommittee and am sorry not to have been able to avail myself of the opportunity it presented to express support for Senate consent to ratification of the Treaty.

The Subcommittee staff had asked me to focus my remarks on certain questions pertaining to constitutional aspects of the Treaty and on the changes the Treaty would effect in extradition practice and jurisprudence. In my view, such constitutional questions as the Treaty or its application may raise are not of such moment as as to warrant denying consent. Of course, any lawyer or scholar can imagine circumstances in which the application of a treaty could implicate constitutional issues. The likelihood of a successful challenge, however, seems remote under presently foreseeable circumstances.

The Treaty would effect a major change in American law and jurisprudence relating to international extradition: specifically by its virtual elimination of the so-called "political offense" exception. I am concerned about the precedent this change would set. The political offense exception has served this country well, by and large. I am persuaded that the rise of international terrorism creates new conditions in which the exception is susceptible to unprecedented risks. In the past, we were probably justified in risking occasional abuses of our good faith motives in declining to extradite political offenders, because on balance this risk was outweighed by the need to remain true to the principles of political liberty from which the exception grew. We could take the additonal risk of offending even our closest allies, moreover, if we could still say, to them and to ourselves, that the greater risk was posed by the likelihood that in extraditing political offenders we would be taking sides in an internal political struggle. The tactics being employed by international terrorists have upset the balance of risks, however.

Movements in pursuit of national political liberty these days are too readily enlisted in an international campaign aimed at destabilizing western democracies as a group. In these changed circumstances, the democracies must respond together if they are to respond effectively at all.

However, I would not like to see the Senate endorse a precipitous rush to eliminate the political offense exception in all extradition treaties with all countries and for all circumstances. In my judgment, the conditions that warrant virtually suspending the political offense exception in respect of requests for extradition from countries with democratic traditions like our own do not justify suspending it across the board.

In fact, this seems a suitable occasion for the Senate to recall that the Constitution calls for the Senate's advice, as well as its consent, to treaties. Where, as here, negotiation of a treaty implicates a deep-rooted national tradition, the sooner the advice is sought and given the better.

I hope these abbreviated comments will strike you as worthy of communicating to the other members of the Subcommittee. In any event, I appreciate your consideration of them.

Sincerely,

Edward Gordon

Edward Gordon

The Honorable
Orrin Hatch, Chairman
Subcommittee on the Constitution
United States Senate
Washington, D.C. 20510

Dear Mr Chairman:

Though I dispise labels, I consider myself conservative because I believe in defending good, honorable and moral traditions. One admirable tradition worth defending in the United States is that of encouraging dissidents, both domestically and abroad. American tradition has permitted the U.S. to accept, without judgement, political dissidents of any stripe. As you consider TheSupplemental Extradition Treaty Between The United States and the United Kingdom, remember that its proposal to remove the political exemption exception would nullify the very tradition of which we speak and which we revere. Dissent is America's conscience and tradition, but this treaty would ravage and distort America's conscience at the bidding order of a foreign power, Britain, the same foreign power, the American tradition was founded to destroy. Britain in its dealings with the Irish People has no conscience. The United States must protect itself from an unconscionable policy and bad legal precedent through your committee.

The treaty under consideration is between the U.S and the U.K., but it is aimed at Irish citizens, a third party country. The treaty is flavored with discrimination by both the U.S. and the U.K. against the Irish People. Since the foundation of Northern Ireland, the U.K. has had an institutionalized policy of discrimination against Catholics backed up by a policy of state sponsored terrorism.

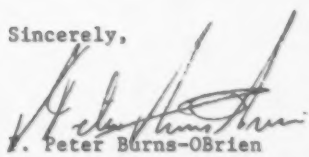
The courts in Northern Ireland have not and cannot protect the rights of citizens, and the British have been cited time after time for gross violations of human rights by international tribunals and organizations. Sean Mc Bride, the Nobel Peace Prize winner and founder of Amnesty International, has said, quite correctly, that the United States, if it passes the treaty, will be sending people back to a system that operates by physical and mental torture and will be condoning and participating in the institutionalized process of violations of human rights of Irish citizens.

The conscience of the United States is on trial before the world. The fine words spoken on patriotic platforms about welcoming the downtrodden of the oppressed nations is also on trial. By submitting this treaty to the Senate for its consent, the President of the U.S. seeks approval of a precedent that will alter the course of America. The so called "Reagan Revolution" is to nullify the principles of the American revolution. This treaty by its very nature signals a change in the meaning of American democracy. Without a political exception, there is no opposition and dissent. Since citizen Genet received political asylum in 1793, the U.S. has preserved a tradition that promotes dissent. This treaty alters the direction of the U.S. and takes the United States on the first step toward totalitarianism and away from freedom and liberty.

Mr. Chairman, some people in this country suggest that the British deserve a "special relationship" with the U.S. A friend would pay off debts, but Britain has not even attempted to pay the interest of its World War I and II debts. During the Vietnam conflict, over fifty percent of the weapons going into Haiphong Harbor went in on British flag vessels. This translates to responsibility for half the American dead, one of whom, Arthur Bowman, USMC, was one of my best friends in college and in the same reserve unit. During the Iranian crisis, Britain continued to trade with Iran. This so called friend should be slapped down. That the administration could even think to make a treaty to ask the U.S. to extradite political dissidents is an abomination. It has been established that guerillas have a right to kill military personnel despite what some pacifists think.

Britain does not come to the U.S. to beg with clean hands. Its hands are dripping with innocent Irish blood. I urge you to do all that you can to defeat this treaty which is grossly anti-American.

Sincerely,



F. Peter Burns-OBrien
Deputy National Director
Irish National Caucus

Bringing Terrorists To Justice — The Shifting Sands of the Political Offense Exception*

Louis G. Fields, Jr.

Extradition is the system by which the formal surrender of an accused criminal, or a fugitive offender, under the jurisdiction of one nation is made to another nation for the purpose of prosecution or punishment. The practice dates back to the Egyptian, Chinese, and Assyro-Babylonian civilizations.[1] It has become an important instrument of international cooperation among nations and an effective tool in the administration of justice.

Professor M. Cherif Bassiouni in his excellent treatise on extradition analyzes the historical development of the practice and the conflicting attitudes with respect to the nature of the obligations arising under the practice. "Hugo Grotius," he writes, "took the view [that a legal obligation existed] and held that the state of refuge should either punish the criminal or surrender him back to the state seeking his return." [2] This view is embodied in the legal maxim *aut dedere aut judicare,* which has become the heart of the several multilateral efforts to prevent and punish particular manifestations of international terrorism, *i.e.,* The Hague [3] and Montreal [4] Conventions (crimes against civil aviation),

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* The views expressed in this paper are those of the author and do not necessarily reflect those of the United States Government or the Department of State.

1. M.C. Bassiouni, International Extradition and World Public Order 1 (1974).

2. *Id.* at 6.

3. Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, — U.N.T.S. — (entered into force Oct. 14, 1971).

4. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *done* Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, — U.N.T.S. — (entered into force Jan. 26, 1973).

the Organization of American States [5] and United Nations [6] Conventions (crimes against internationally protected persons), the Hostages Convention,[7] the European Convention Against Terrorism [8] and the Bonn Declaration.[9]

Declan Costello, former Attorney General of Ireland, has reflected on the relationship between this principle and the effort to solve the problems of terrorism on a worldwide basis. In the context of Northern Irish terrorism, he wrote in 1975:

> Acts of terrorism associated with the conflict have not been confined to the area of the Six Counties of Northern Ireland, nor have the consequences of the violence been limited to that area. Acts of terrorism by members of organizations connected with the violence in Northern Ireland have taken place both in the Republic of Ireland and in Great Britain. Persons guilty of acts of terrorism can move with comparative ease into both Great Britain and the Republic of Ireland. Attempts to extradite alleged offenders have been resisted by pleas that the offense with which the accused was charged was a "political offence or an offence connected with a political offence." The solutions offered are of interest not merely because they afford another example of the application of the principle *aut dedere aut judicare*, but also because they contain measures for the detailed implementation of the principle which could be of relevance elsewhere.[10]

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5. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons, *done* Feb. 2, 1971, [1971] O.A.S. T.S. No. 37, O.A.S. Doc. OEA/Ser.A/17.

6. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, — U.N.T.S. — (entered into force Feb. 20, 1977).

7. International Convention Against the Taking of Hostages, *done* Dec. 13, 1979, 34 U.N. GAOR, Annex (Agenda Item 113) 5, U.N. Doc. A/34/819 (1979).

8. European Convention on the Suppression of Terrorism, *done* Jan. 27, 1977, Europ. T.S. No. 90.

9. Bonn Declaration (Joint Statement on International Terrorism), *done* July 17, 1978, *reprinted in* 78 DEP'T STATE BULL. 5 (Sept. 1978).

10. Costello, *International Terrorism and the Development of the*

While the principle of *aut dedere aut judicare* does, as suggested by Attorney General Costello, hold some promise in the worldwide struggle against terrorism, it is, in practice, not always an immutable guarantee that accused terrorists will ultimately be prosecuted for their acts. The political character of most acts of terrorism has legal implications under prevailing extradition arrangements, both bilateral and multilateral. The traditional political offense exception found in almost every extradition treaty and convention can be invoked to frustrate the extradition process.

The Committee of Ministers of the Council of Europe adopted a significant resolution on international terrorism at its 53rd Session on January 24, 1974.[11] This resolution became a turning point in the approach to the political offense exception within this important regional constituency. That resolution notes in its preambular language that the Committee of Ministers is "[c]onvinced that . . . the political motive alleged by the authors of certain acts of terrorism should not have as a result that they are neither extradited nor punished. . . ." [12] It calls upon Member States to consider decisions on extradition requests for alleged perpetrators of certain terrorist acts with due regard to the severity of that act, the collective danger to life and liberty, especially of innocent persons, and the cruel or vicious means employed in its commission. If extradition is refused, the resolution calls upon Member States, consistent with their national laws, to submit the case for prosecution to their competent authorities.

The European Convention on the Suppression of Terrorism [13] was the outgrowth of this resolution of the

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Principle Aut Dedere Aut Judicare, 10 J. INT'L L. & ECON. 483, 497 (1975) (footnotes omitted).

11. Res. (74)3, *adopted* Jan. 24, 1974, *reprinted in* Council of Europe, Explanatory report on the European Convention on the Suppression of Terrorism, at 29 app. (Jan. 27, 1977) [hereinafter cited as Explanatory report].

12. *Id.* preamble.

13. European Convention on the Suppression of Terrorism, *done* Jan. 27, 1977, Europ. T.S. No. 90.

Committee of Ministers. It was adopted by the Council of Europe on January 27, 1977, and its preamble notes "the growing concern caused by the increase in acts of terrorism" and reflects the desire of the Council "to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment."[14] The Convention relies essentially on the *aut dedere aut judicare* principle to achieve this objective. It purports to "depoliticize" the offenses in Article 1, *i.e.*, aircraft hijacking and sabotage, acts against internationally protected persons, hostage-taking and use of bombs, grenades, rockets, automatic firearms or letter/parcel bombs in the commission of offenses. These are the crimes which have become the *modus operandi* of the contemporary terrorist.

The fact that the Council of Europe adopted this Convention demonstrates the problem of the "political offense" in European efforts to suppress terrorism. The official Council of Europe report on the Convention reflects the strongly held view of the Council that "extradition is a particularly effective measure for combating terrorism." [15] It recognizes, however, that "terrorist acts might be considered 'political offences', and it is a principle — laid down in most existing extradition treaties as well as in the European Convention on Extradition (*cf.* Article 3 paragraph 1) — that extradition shall not be granted in respect of a political offence." [16] The Report avers to the fact that "there is no generally accepted definition of the term 'political offence' " and that "[i]t is for the requested State to interpret it." [17]

The Report suggests that "the Convention reflects the consensus which reconciles the arguments put forward in favour of an obligation, on the one hand, and an option, on the other hand, not to consider, for the purposes of application of the Convention, certain offences as political." [18]

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14. *Id.* preamble.
15. *Explanatory report, supra* note 11, at 7.
16. *Id.* at 7.
17. *Id.*
18. *Id.* at 8.

Although the Convention obliges a Contracting State to extradite an alleged offender found in its territory, it allows a Contracting State to declare by a reservation that it retains the right to refuse extradition of such an offender if it considers his offense to be a political offense or one connected with a political offense.[19] Moreover, Article 5 permits the requested State to deny extradition if it has "substantial grounds for believing that the request for extradition . . . has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons." [20]

The political offense exception appears to be the Achilles' heel to the international resolve to bring terrorists to justice. While the European Convention attempts to ameliorate this vulnerability, it falls short. The Article 5 discretion to determine whether an offense is one of a political character may, in effect, benefit the terrorist if a requested State uses that discretion to opt in favor of an expedient prosecution (required under Article 7) rather than extradition. While scrupulously honoring the maxim *aut dedere aut judicare*, this approach could indeed frustrate the ends of justice.

The difficulties confronting the European Community in grappling with the political offense exception in the context of its struggle against contemporary terrorism are not unlike those encountered within our own judicial system. The assertion of the political offense exception was relatively rare in our extradition experience. Modern terrorism, often committed in the name of the political cause or under the banner of a politically oriented group, has changed this situation and created the same dilemma for United States courts that it has for foreign governments and courts in dealing with this new breed of criminality. The inherent problem is the lack of generally accepted definitions for

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19. European Convention for the Suppression of Terrorism, *done* Jan. 27, 1977, art. 13, Europ. T.S. No. 90.

20. *Id.* art. 5.

"terrorism" and the "political offense." The current cliché "one man's terrorism is another man's heroism" simplistically suggests the reason behind the lack of consensus on a definition. Furthermore, the political overtones or underpinnings of the majority of acts of terrorism have produced many ambiguities in State and judicial practice in applying the political offense exception. This situation has led courts both here and abroad into *ad hoc* approaches to definitions, tailored to meet the needs of particular cases.

II. The U.S. Case Law

A. The McMullen Case

On May 11, 1979, U.S. Magistrate Frederick J. Woelflen [21] held that Peter Gabriel John McMullen, an accused Irish terrorist, was not extraditable to Great Britain under the provisions of the extradition treaty in force between the United States and the United Kingdom as of the date of the offense (1974) for which his extradition was sought.[22]

The facts of the case reveal that McMullen, a deserter from the British Army, joined the Provisional Wing of the Irish Republic Army (PIRA) and took part in the bombing of Claro Barracks in Great Britain. The Magistrate found that "an insurrection and a disruptive uprising of a political nature did, in fact, existed [*sic*] in Northern Ireland in 1970 and particularly in 1974, when Mr. McMullen is charged with the crimes against Claro Barracks, a British Army installation." [23] Determination of the existence of a political conflict, he held, is "one of the steps necessary in the application of the political exception defense." [24]

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21. Magistrate for U.S. District Court, Northern District of California.

22. In re McMullen, No. 3-78-1099 (N.D. Cal. May 11, 1979).

23. *Id.* at 4.

24. *Id.*

The Magistrate next turned to the crime itself and found that McMullen "acted as a member of PIRA, his activities were directed by . . . the PIRA, and that the bombing was a crime incidental to and formed part of a political disturbance, uprising or insurrection and in furtherance thereof." [25]

The Magistrate's ruling, from which the government may not appeal,[26] has caused deep concern to those charged with administering the U.S. program to combat terrorism. Magistrate Woelflen's memorandum opinion points to the Government's failure "to offer evidence that contradicts circumstances or activities which make the political exception applicable." [27] There is a traditional reticence on the part of the Government to produce official witnesses to testify to the position of the government with respect to the character of an offense in an extradition proceeding. Clearly, contemporary terrorism — and the *McMullen* case — has necessitated a reassessment of this traditional view.

B. The Abu Eain Case

Ziyad Abu Eain, a young Jordanian resident of the West Bank, was provisionally arrested in Chicago on August 21, 1979, at the request of the Israeli government, under the U.S.-Israel Extradition Treaty. This incident [28] brought the issue of the political offense exception once again before a U.S. Magistrate. Abu Eain was charged with murdering two Israeli youths and causing bodily harm, with aggravating intent, to thirty-six persons. The crimes were alleged to have been committed by the delayed detonation

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25. *Id.* at 6.

26. FED. R. CRIM. P. 5.1(b).

27. In re McMullen, No. 3-78-1099, slip op. at 6 (N.D. Cal. May 11, 1979).

28. Convention on Extradition, Dec. 10, 1962, United States-Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476, 484 U.N.T.S. 283 (entered into force Dec. 5, 1963).

of an explosive device placed in a trash bin in a public market place in Tiberias, Israel on May 14, 1979. The accused was implicated in the act by a co-conspirator and charged under an information filed in the District Court of Tel Aviv-Jaffe, an ordinary Civil Court in Israel.

In his defense at the extradition hearing before U.S. Magistrate Olga Jurco, he asserted the political offense exception, citing the "political conflict between the government of . . . Israel and the several Arab States and the People of Palestine." [29] The defense produced lay and expert witnesses to establish the existence of such a conflict, the recruitment of Abu Eain into the Palestine Liberation Organization (PLO), and his motivation in the commission of the acts charged. This strategy was intended to demonstrate that those acts were "of a political character" and, therefore, exempted from the operation of the U.S.-Israel Extradition Treaty pursuant to Article VI.[30]

The author, under the authority of the Department of State, appeared as a government witness to testify to the position of the Department regarding the character of the

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29. In re Abu Eain, No. 79 M 175 (N.D. Ill.), Transcript Record for Sept. 27, 1979, at 271.

Counsel for Abu Eain requested the Magistrate to take judicial notice of the fact

> [t]hat there is now and has existed for more than three decades, a military and political conflict between the Government of the State of Israel and the several Arab states and the people of Palestine.

The Magistrate refused to take such judicial notice because such notice can be taken "only of those matters generally known [to be] within the territorial jurisdiction of the trial court, or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned (cf. Ev. Rule 201(b))." In re Abu Eain, No. 79 M 175, slip op. at 13-14 (N.D. Ill. Dec. 18, 1979).

30. Convention on Extradition, Dec. 10, 1962, United States-Israel, art. VI(4), 14 U.S.T. 1707, T.I.A.S. No. 5476, 484 U.N.T.S. 283 (entered into force Dec. 5, 1963).

offense.[31] The crux of that testimony is found in the following excerpt from the original transcript of the Magistrate's hearing:

By MR. SULLIVAN [U.S. Attorney Thomas P. Sullivan]:

Q. Mr. Fields, does the United States Department of State regard the offense described in Government Exhibits 1, 2 and 3 [Israeli extradition documents] as one of a political character?

A. It does not.

Q. And how does the Government regard that offense?

A. As a common crime.[32]

. . . .

Q. . . . Will you please state the reasons for the answers you just gave, namely, that the Department of State regards the act described in [the Israeli extradition documents] as common criminal acts [*sic*] and not as an offense of a political character?

A. . . . It is the view of the Department of State that the indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act and, as such, is a common crime of murder. And it is punishable in both states.[33]

The testimony of the government witness was strenuously opposed by defense counsel on the ground that "decisional law of the Courts of the United States . . . holds that (the question of determining the political character of a crime) is a matter solely within the competence of the Courts and . . . the political position of the State Department of the Executive Branch is of no concern in making that decision."[34] Principal reliance for support of this posi-

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31. On the subject of proving international law by the testimony of expert witnesses, *see* Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT'L L. 619 (1978).

32. In re Abu Eain, No. 79 M 175 (N.D. Ill.), Transcript Record for Oct. 10, 1979, at 1038.

33. *Id.* at 1040-41.

34. *Id.* at 910.

tion was rested upon the following excerpt from Magistrate Woelflen's opinion in the *McMullen* case:

> We do not look to the Executive arm of the government, particularly the State Department for a determination as [to] what this government considers as an act of political defense relative to criminal activity occurring on the soil of a foreign nation.[35]

It was Magistrate Woelflen's conclusion that judicial precedents governed such a decision.

Magistrate Jurco did not follow her California colleague on this point and took testimony from the Department of State's witness regarding the Department's position on the nature of the offenses charged in the extradition request. She observed that Abu Eain had been given the opportunity to present evidence bearing upon his interpretation of Article 6(4) of the Treaty and, therefore, that the government of the United States must be accorded its opportunity in rebuttal.

In seven days of hearings, Magistrate Jurco received in evidence thirty-five exhibits, heard testimony from a broad spectrum of witnesses, and considered extensive pre-trial briefs and oral arguments. She scrupulously restricted evidence which tended to preempt issues considered to be within the province of the court. An excellent example of her view on this point is found in her ruling on an objection to a defense question to the Department of State's witness which attempted to elicit whether the Department had considered "the existence of a political conflict in the Middle East" [36] in reaching its position on the character of Abu Eain's offenses. The Magistrate stated:

> I have, indeed, received the testimony of Mr. Fields in order to be provided with knowledge of what the requesting party's attitude is with regard to this of-

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35. *Id.* at 909 (quoting In re McMullen, No. 3-78-1099, slip op. at 3 (N.D. Cal. May 11, 1979)).

36. *Id.* at 1077.

fense. And while I have permitted great leeway in connection with the response that was made by Mr. Fields yesterday, I think we are approaching a matter which is again left to me for the facts, balanced upon whatever weight I may give it, if any, on what had previously been testified to by this witness.

This is an ultimate fact which is mine. And the weight of the evidence, such as it is, and has been presented, will be taken and balanced with regard to the determination that I make.

Whether or not this witness, as a Department of State official, regarded it as political character, I think is encompassed within the answer that he gave yesterday. They regard it as a common crime was his response.

I do not want to go into the aspects of all of the minutia of what constituted political character or what they regarded as political character.

I am going to sustain the objection, because I feel that that is my decision.[37]

On December 18, 1979, Magistrate Jurco certified to the Secretary of State that there was sufficient evidence to sustain the charge against Abu Eain set forward in the extradition request and that the offenses charged are not political in character so as to prevent extradition under the Treaty. Her memorandum opinion,[38] annexed to her certification, contains the following analysis to the evidence on the question of the political character of the offenses charged and, since it otherwise would not be publicized, deserves quotation here at length: "The accused presented evidence to show that the offenses, if committed by him, are offenses which are 'political in character.' Evidence was received which sought to explain and clarify the nature of the conflict in the Middle East before, during and after the 1948 proclamation of a State of Israel. . . .

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37. *Id.* at 1079-80.

38. In re Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979).

"A relative political offense is one, which standing alone, is a common crime, but if it is connected with a civil war or other similar disturbance it becomes a political offense for purpose of avoiding extradition. The accused's evidence is directed to show that these offenses, if committed by the accused, come within the category of political offenses. Professor [William Thomas] Mallison also described a political offense as an offense committed for the purpose of changing the governmental structure. It was his opinion that there was and is a state of war since 1948 in Israel or that there exists an insurrection in Israel; that the conflict in the Middle East is a political and military conflict and that the purpose of the P.L.O. is to alter the governmental structure in Israel and Palestine. He also testified that noncombatants have a different relationship to enemy power and that direct attacks on civilians are unlawful notwithstanding the perpetrator's identity.

"The testimony of Mayor Qawasmeh of Hebron, Jordan, and that of Ms. Johnson, former State Department vice-consul in [the] City of Jerusalem, described the manner and condition of Arab life in the occupied West Bank of Jordan. It was elicited from these witnesses that the occupied West Bank is governed through Israeli military governors; that there is freedom of election exercised by West Bank Arabs in local self-government and no Israeli votes in such election; that there are civil courts with Arab judges; that Jordanian law is applied in the West Bank; that freedom of movement is generally permitted but there are also restrictions and in certain areas person[s] and property are subject to search; that membership in certain organizations is subject to arrest and punishment in Israeli military tribunals; that expropriation of land and seizure of property occurs for commission of certain acts and crimes; that there is resistance to Israeli occupation of the West Bank; that the P.L.O. is the representative for the Arabs. The evidence also showed that the demography of Israel and the West Bank of Jordan has altered considerably in that there

has been a great increase in the area of the Jewish population; that this is due to dedication to Zionist principles in the creation of Israel establishing national rights for Jews; that the Palestinian Arabs do not consider they are citizens of the country of Jordan and do not want citizenship there.

"Counsel for accused states the political program of Fatah is directed to 'creating a "democratic non-sectarian state" in place of the present State of Israel; and resisting Israeli occupation of Palestinian land.' The accused emphasizes that the P.L.O. has received recognition as the legitimate representative for the Palestinian-Arabs in the United Nations, is an official observer in that body and has been recognized by other organizations and countries. He calls attention to the concern of the world community of nations through the Geneva Convention and United Nations resolutions for adherence to humanitarian considerations to be given by Israel to Palestinian-Arab refugees in the occupied West Bank of Jordan. Exhibits have been received in evidence dealing with such concern.

"The government regards all of the accused's evidence to be irrelevant. It urges that because the offenses involved the death and injury of innocent victims, it is an act of terrorism, and further, under any theory of 'offense of political character,' parties who are the target victims must be considered. The accused sought discovery as to the status of those who were killed and injured; it was denied. It was the testimony of Louis Fields, appearing as the authorized spokesman for the Department of State, and who is Legal Adviser [*sic*] for the Department of State, that the offenses described in Government Exhibits 1 through 3 are viewed by the Department of State as common crimes and not offenses of political character, because 'it was indiscriminate use of violence against civilian populations, innocent parties.'

"In evaluating the nature of the offenses, various scholars on the subject of political offenses have delineated certain tests to assist in the determination. Among these are the

following: (1) the offender's past participation and involvement with a political movement and his personal beliefs as tied to a political motive; (2) existence of a connection or link between the crime and political objective; (3) relation or proportion between the crime and its method of commission and the political objective.

"The accused refers to the Statement of Yasin to show his political motivation in that they talked politics and he agreed to enlist in the Fatah organization. There next must be shown a connection between the crime and the political objective of Fatah and the P.L.O. The statement of Yasin shows he wished to carry out an attack on May 14, that the date was a Monday, not a Tuesday, as he had thought; that the attack was to put 'the explosive charge in a refuse bin in Tiberias; it did not matter what refuse bin,' that he admonished the accused not to go near an army vehicle. The target is not otherwise described.... Government's evidence shows that on May 14, two young Jewish males were killed and thirty-six other persons were injured and hospitalized; that Tiberias is a sea resort town located on the Sea of Galilee, which had been a part of the State of Israel since 1948; Government Exhibits 2 and 3 show the explosive was placed in a public place, near a bus stop on Galil Street in the market square in Tiberias, Israel. The accused seeks shelter in the history and evidence of Israeli-Arab conflict and in the existence of the P.L.O. as his political motivation to kill and injure; in other words, he seeks to equate the actions of violence as political because he is a member of an organization which acts for and on behalf of the P.L.O. Counsel for accused urges that evidence of the conflict and turbulence between Israel and the Palestinian-Arabs, the existence of the P.L.O. as the central representative for the Palestinian-Arabs, and the tactics of the P.L.O. in achieving its political objective, 'tend' to show his alleged offenses were political offenses; that the burden now shifts to the government to show otherwise and it has failed to show that innocent civilians were killed and

injured. That argument overlooks a significant issue — that it is [the] accused whose acts are subject to scrutiny; he must show the link between the crimes he allegedly committed and their relation to the political objective. Exemption of relative political crimes exists only where such crimes are directed against the political organization of the State. The achievement of that political objective has not been linked to the means used and the target involved. The evidence shows a random selection of the locale; a locale where a Youth Rally and religious festival was being held in Tiberias, Israel. Defendant's argument seeks to lead to a conclusion that every Israeli present in Tiberias is in the military service of his country and therefore cannot be regarded as a civilian; that a violent act by a Palestinian-Arab against an Israeli comes within the political offense exception.

"Accepting that defendant was a member of a P.L.O. organization and with motivation toward its political objective, there is nothing in the evidence which 'tends' to show that this act was directed in opposition to the State of Israel and that the crime furthered the cause of his group objective. He has not shown the relation between these crimes, the method of their commission and the political objective. The random and indiscriminate placing of an explosive near a bus stop on a public street in any trash bin defuses any theory that the target was a military one or justified by any military necessity. It was an isolated act of violence. The commission of these alleged offenses is so remote from the political objective that it could not reasonably have been believed by the offender to have a direct political effect on the government of Israel; nor was it directed at the government of Israel.

"The accused has failed to present evidence establishing, or even tending to establish, that the nature and the circumstances of the commission of the common crimes of

murder and causing bodily injury with aggravating intent are such as to make such crimes as offenses of a political character." [39]

Abu Eain petitioned the United States District Court for a writ of habeas corpus on December 29, 1979. After the refusal of two judges, the case was assigned to Judge Frank McGarr, who denied the petition on March 28, 1980.[40] In a memorandum opinion, Judge McGarr adopted and appended the Magistrate's "detailed memorandum opinion" [41] and addressed, in pertinent part, the political offense issue, as follows:

> Petitioner next argues that the alleged offense is of a political character and, pursuant to Article VI of the treaty, is not an extraditable offense. The magistrate, properly admitting probative evidence on the issue and properly exclud[ing] other proffered evidence, and applying appropriate legal standards, found that the alleged offense was not of a political character. The finding is based on competent evidence and is the result of the application of properly legal standards.[42]

An appeal from Judge McGarr's order has been filed with the United States Court of Appeals for the Seventh Circuit.

III. The Evolving International Attitude

The *McMullen* and *Abu Eain* cases are among the first to deal with the political offense exception in the context of contemporary terrorism, and each reached a different result. Both cases involved the use of bombs in the commission of the respective crimes. In the *McMullen* case the target was a military barracks, situated in the British Isles,

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39. *Id.* at 14-21.

40. Abu Eain v. Adams, No. 79 C 5477 (N.D. Ill. Mar. 28, 1980) (order denying habeas corpus).

41. *Id.* at 1.

42. *Id.* at 3.

remote from the site of the civil disturbance or uprising (Northern Ireland), whereas the target in the *Abu Eain* case was a public market place in Israel, which is engaged in an armed conflict with certain neighboring Arab States. These crimes are generally regarded as acts of terrorism and the offenses were so represented to the respective Magistrates.

The *McMullen* decision found the "political offense crime" to be incidental to "a political disturbance and committed as furthering a political uprising" based upon evidence showing that "highly placed officials in the British government" admitted that there was an insurrection in Northern Ireland.[43] Taking the existence of the political uprising together with McMullen's service as a PIRA member, the Magistrate found no difficulty in extending the "disruptive uprising of a political nature" across the Irish Sea to Great Britain.

On the other hand, in the *Abu Eain* case Magistrate Jurco decided that, even accepting the defendant's membership in a Palestinian organization (AL FATAH) which could have motivated his crime, there was nothing in the evidence which tended to show that his act was directed against the State of Israel or that his crime furthered the cause of his group objective. She ruled that Abu Eain's crime was "so remote from the political objective that it could not reasonably have been believed by the offender to have a direct political effect on the government of Israel; nor was it directed at the government."[44]

Both Magistrates described the respective offenses as being "deplorable and heinous" and "actions of violence." Each, however, attached a different degree of significance to affiliation with a politically oriented terrorist group and the

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43. In re McMullen, No. 3-78-1099, slip op. at 3 (N.D. Cal. May 11, 1979).

44. In re Abu Eain, No. 79 M 175, slip op. at 20-21 (N.D. Ill. Dec. 18, 1979).

linkage between the act, the motive, and the political disturbance alleged in the respective cases. The result, therefore, in the *Abu Eain* case appears clearly to be more in line with the evolving international attitude towards acts of violence commonly associated with the contemporary terrorist.

Many States now regard terrorism, its political motivation notwithstanding, as not falling within the political offense exception. Recent court decisions such as that of the Supreme Court of Greece in the *Pohle* extradition case [45] reflect this trend. The court adopted "a very narrow definition of a political crime, taking it to cover only actions aiming directly at overthrowing the existing system, not all those prompted by political ideas or motives." [46]

Two recent companion cases decided in France also reflect this growing trend. The Paris Court of Appeals acting on an Italian request for the extradition of Francesco Piperno and Lanfranco Pace (two Italian fugitives implicated in the brutal kidnap-murder of Aldo Moro) held these two accused terrorists to be extraditable.[47] Both Piperno and Pace sought exemption from extradition on the ground that their crimes were political in nature. The French court found the charges (kidnapping and murder) to be "undeniably ordinary law crimes", pointing out that:

> However, the court cannot deny the fact that these crimes could be placed in a political context, allowing the defense to invoke, on a subsidiary level, their political nature and to request the court to reject the request for Pace's extradition.[48]

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45. In re Rolfe Pohle, Wash. Post, Oct. 4, 1976, § A at 24, col. 1 (Sup. Ct. Athens, Oct. 1, 1976).

46. For a discussion of the *Pohle* decision and the relevant provisions of Greek law, *see* P. TSILAS, EXTRADITION UNDER GREEK LAW: THE ROLFE POHLE CASE (Library of Congress, 1977).

47. In re Pace, No. 1402-79 (Cour d'Appel de Paris Nov. 7, 1979); In re Piperno, No. 1343-79 (Cour d'Appel de Paris Oct. 17, 1979). *See* the article by Carbonneau, at pp. 66-89 of this text.

48. In re Pace, No. 1402-79 (Cour d'Appel de Paris Nov. 7, 1979). Official Department of State Translation, LS No. 95709, at 13.

Despite the political context, the court noted the "extreme seriousness of the charges" involving the murder of "an innocent person held against his will" and concluded:

> Whatever the purpose of such acts and regardless of the context in which they might be placed, they may not, in view of their seriousness, be considered political in nature.[49]

These cases demonstrate unequivocally that courts are beginning to take the view that the political offense exception does not encompass all terrorist acts, especially acts involving innocent persons. These developments might well portend the emergence of a nascent rule of international law on the political offense exception, giving rise to hope that violent crimes directed against or affecting innocent persons will become "off limits" to the terrorists of the world. The conventions cited previously and the emerging judicial approach to the political offense exception seem to indicate the evolution of a doctrine along these lines. Indeed, we can conclude that the sands of the political offense exception are definitely shifting away from the terrorist who seeks to cloak his heinous act with the robe of political justification.

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49. In re Pace, No. 1402-79, extract of minutes of the Secretariat at 12 (Cour d'Appel de Paris Nov. 7, 1979). Official Department of State Translation, LS No. 95709, at 14.